The Lawyer's Companion series.

THE INDIAN EASEMENTS ACT, 1882.

(ACT V OF 1882.)

(with the case-law thereon.)

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ACT V OF 1882.

THE INDIAN EASEMENTS ACT.

RECEIVED THE G. G.'S ASSENT ON THE 17TH FEBRUARY 1882.

An Act to define and amend the law relating to Easements and Licenses.

WHEREAS it is expedient to define and amend the law relating to Easements and Licenses: It is hereby enacted as follows :—

Preamble.

PRELIMINARY.

Short title.

1. This Act may be called "The Indian Easements Act, 1882":

Local extent.

It extends to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg;

Commencement.

and it shall come into force on the first day of July 1882.

(Notes).

(Scope of Act).

(1) Act not in force in the Punjab.

This Act is not in force in the Punjab. But the Punjab Courts may adopt the provisions of the Act, in the absence of any statutory law applicable to the facts of a case, especially where such provisions are in accordance with justice, equity and good conscience. 85 P.R. 1902. **A**

(2) Nor in Bengal.

(*a*) In Bengal this Act is not in force. 30 C. 503. **B**

(*b*) The Easement Act does not prevail in Bengal. 29 C. 363 (366). **C**

(3) Extension of Act to N. W. P. and Oudh.

The passing of Act VIII of 1891 which extended the operation of the Act to North-West Provinces and Oudh, cannot in the absence of express words, be taken as retrospective. 14 A. 185. **D**

(4) Decision of cases in places where the Act not in force.

In places where this Act has not been extended, cases will have to be decided on general principles and case-law. 29 C. 363 (366). **E**

(5) Applicability of general principles of the Act.

A test applicable under this Act (as for example the provisions of S. 13) has been applied in parts of India where the Act is not in force. 14 B. 452. **F**

English Law.

(1) Difference between English Law and the Act.

This Act is not merely prescriptive. It defines the law relating to easements and thus differs from the English Law in its *ambit*. 7 Bom. L.R. 825. **G**

English Law.—(Concluded.)

(2) **Applicability of English Law.**

The more or less refined principles and doctrines of English Law on the subject of easements, being founded on legal conception not altogether in harmony with eastern notions, their application to Indian cases should be discouraged. 8 C.W.N. 425 (**P.C.**). H

2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed ; or to derogate from—

Savings.

(*a*) any right of the Government to regulate (1) the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation ;

(*b*) any customary or other right (2) (not being a license) in or over immoveable property which the Government, the public or any person may possess irrespective of other immoveable property ; or

(*c*) any right acquired, or arising out of a relation created, before this Act comes into force (3).

(Notes).

1.—"any right of the Government to regulate..for irrigation."

(1) **Distribution of water—Rights of Government.**

(*a*) The right of Government in connection with the distribution of water cannot be held to include a right to flood a man's land, because, in the opinion of the Government, the erection of a work, which has this effect, is desirable in connection with the general distribution of water. 28 M. 72=15 M.L.J. 32. I

(*b*) The Government has the right to distribute the water of its channels for the benefit of the public, subject to the right of a ryotwari land-holder, to whom water has been supplied by Government, to continue to receive *such* supply as is sufficient for his accustomed requirements. *Ibid.* J

(2) **Irrigation channel—Government's power.**

The Collector has no power to allow a ryot to open a new irrigation channel, which caused a material alteration in the supply of water in an old irrigation channel, from which the plaintiff irrigated his lands. 16 M. 339. K

(3) **Right of water—Government's power of interference.**

There is no authority for the doctrine that the Government have, at any time during an occupancy, the power to arbitrarily curtail or interfere with the rights of each occupant, whose land abuts on a natural stream, to the enjoyment of the water as it existed at the commencement of his occupancy—a right, which must have constituted a most important consideration in fixing the amount of land assessment which each occupant agreed to pay. 7 B. 209. L

1.—"***any right of the Government to regulate..for irrigation.***"—(*Continued*).

(4) **Right of Government to supply water to ryotwari villages.**

(*a*) The Government has power to regulate the distribution of water-supply among ryotwari villages held immediately under the Government or to the lands of proprietors or their tenants, whose enjoyment of it is simply permissive. 5 M.H.C. 6. **M**

(*b*) The Government has the undoubted right to regulate the distribution of water supplied to its ryotwari villages subject to an implied contract with its tenants from year to year that the existing arrangements for the supply of water will not be interfered with. 7 M.H.C. 60. **N**

(5) **Right of Government to stop flow of water—Natural stream.**

The Government has not the right to stop the flow of water in a natural stream, under the Bombay Irrigation Act, though its flow of water may be derived partly from a canal. 28 B. 105. **O**

(6) **Leakage of water from a canal—Rights of canal officers.**

Water which has leaked from a canal into a land would not belong to the Irrigation Department so that the latter would have the right to dam a stream or water-course on that ground. Under S. 48 of the Bombay Irrigation Act, the canal officers are, only, empowered to charge a water-rate on lands which in their opinion receive a supply from percolation or leakage or surface flow. 23 B. 761. **P**

(7) **Statutory authority for construction of works.**

(*a*) A person or body of persons, having statutory authority for construction of works, must exercise it with ordinary care and skill and with some regard to the property of others. The undertakers of such works should do as little damage as possible in the exercise of their statutory powers. 27 B. 344 (352) (**P. C.**)=7 C.W.N. 393, *on appeal from* 2 Bom. L.R. 357. **Q**

(*b*) The position of the Government, in regard to liability for damage caused to individuals, by irrigation works, would be analagous to that of persons acting under statutory authority. 28 M. 72 (78). **R**

(*c*) The conservation and control of works of irrigation have, from the earliest times, been the special function and duty of Government in India; and Government has, accordingly, the right to carry out repairs and improvements in the irrigation works belonging to it, provided that, in doing so, it does not diminish materially the supply of water to which others may be entitled. 28 M. 539 (542)=15 M.L.J. 251. **S**

(8) **Zamindar's duty to maintain irrigation works**—*Vis major.*

In a case where the duty of maintaining an irrigation tank lay on a zamindar, and where the tank, without any negligence on his part, breached and washed away an adjoining Railway line, it was held by the Privy Council that, the breach not having been due to the zamindar's negligence but to *vis major*, he was not liable in damages to the Railway Company. 22 W.R. 279=14 B.L.R. 209=1 I.A. 364 (**P.C.**), *on appeal from* 6 M.H.C. 180. **T**

(9) **Authority of Government—Construction of old and new works.**

(*a*) So far as the construction of new works is concerned, the authority of Government is but *permissive*, while, as regards the maintenance of works once completed, so as not to interfere with the existing rights of other persons, the authority of the Government is *imperative*. 28 M. 72 (79). **U**

1.—"any right of the Government to regulate...for irrigation."—(Concluded).

(*b*) The imperativeness ascribable to the maintenance of irrigation works once lawfully brought into existence, by which no responsibility is incurred unless negligence is proved, must be confined strictly to the conversion of the work, as originally designed and executed, and cannot be extended to any material alteration and additions made in, or to, any existing old work. 28 M. 72=15 M.L.J. 32. **Y**

2.—"any customary or other right."

Right of inhabitants of a village to bathe in a tank.

The inhabitants of a village may be entitled to bathe in a tank on showing that the tank has been, from time immemorial, used by them as of right. Though this is not an easement, it is a customary right, which is specially saved by the Act. 1 M.L.J. 47. **W**

See, further, Notes under S. 18, *infra*.

3.—"any right acquired .... before this Act came into force."

Acquisition of rights before the Act.

This Act cannot affect rights acquired long before the Act came into force. P.J. (1897), 353. **X**

Repeal of Act XV of 1877, sections 26 and 27.

3. Sections 26 and 27 of the Indian Limitation Act, 1877, and the definition of "easement," contained in that Act, are repealed in the territories to which this act extends. All references in any Act or Regulation to the said sections, or to sections 27 and 28 of Act No. IX of 1871, shall, in such territories, be read as made to sections 15 and 16 of this Act.

CHAPTER I.

OF EASEMENTS GENERALLY.

"Easement" defined.

4. An easement (1) is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

Dominant and servient heritages and owners.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage (2), and the owner or occupier thereof the servient owner.

Explanation.—In the first and second clauses of this section, the expression "land" includes also things permanently attached to the earth: the expression "beneficial enjoyment" includes also

possible convenience, remote advantage, and even a mere amenity; and the expression "to do something" includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage, or anything growing or subsisting thereon.

Illustrations.

(*a*) A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(*b*) A, as the owner of a certain house, has the right to go on his neighbour B's land, and to take water for the purposes of his household out of a spring therein. This is an easement.

(*c*) A, as the owner of a certain house, has the right to conduct water from B's stream to supply the fountains in the garden attached to the house. This is an easement.

(*d*) A, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on B's field, or to take, for the purpose of being used in the house, by himself, his family, guests, lodgers, and servants, water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on E's land. These are easements.

(*e*) A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.

(*f*) A is bound to cleanse a watercourse running through his land, and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement.

(Notes).

1. "Easement"—General.

(1) **Easement includes** *profits a prendre*.

(*a*) The words easement, as used in the Limitation Act of 1877, embraces what in English law is called a *profit a prendre*. 5 C. 945; 19 C. 544. **Y**

(*b*) But, under this Act, a *profit a prendre* in gross cannot be considered as an easement which includes only a *profit a prendre appurtenant*. Mitra Limitation, p. 414. **Z**

(2) *Profits a prendre* **appurtenant.**

Easements of the nature of *profits a prendre* appurtenant to land, though not technically regarded as easements in English Law, are easements under this Act. 23 B. 397 (402). **A**

(3) Right of planting rice plants for purposes of transplantation.

Where the defendant's land was used by the plaintiff to grow rice plant at a certain part of every year to be transplanted afterwards to the plaintiff's land, the defendant's right was held to be an easement of the nature of a *profit a prendre* appurtenant to land, and not a new easement, 23 B. 397. **B**

1.—"Easement"—General.—(Continued).

(4) **Right of inhabitants of a village to use a private well.**

The claim by the inhabitants of a village to water from a private well is not a *profit a prendre* but is a customary right. 2 M.L.J. 290. C

(5) **Easement, whether immoveable property.**

(*a*) The term 'immoveable property' comprehends all that would be real property according to English Law as also incorporeal hereditaments. 21 W.R. 178 (P. C.). D

(*b*) The term immoveable property, as defined in the General Clauses Act, includes as well incorporeal rights in immoveable property as tangible immoveable property. 13 M. 54. E

(*c*) The General Clauses Act enacts that immoveable property shall include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. This definition includes *profits a prendre* such as a fishery in *alieno solo*. 19 C. 544. F

(*d*) The word "include" in cl. 26, S. 3 of the General Clauses Act, is intended to be enumerative and not exhaustive. 2 M. 5. G

(*e*) Merely because an easement proper, such as a right of way, is not a "benefit to arise out of land," it does not follow that easements are not immoveable property by General Clauses Act. 23 B. 673. H

(6) **Immoveable property includes incorporeal hereditaments.**

The terms "immoveable property" and "interest in immoveable property" are to be held to include not only lands and houses, and such other things as are physically incapable of being moved, but also such incorporeal hereditaments as issue out of, or are connected with, immoveable property, properly so called, and, therefore, to use the language of the old English Lawyers "savour of the realty." 5 B. 322 (335). I

(7) **Instances of interests in immoveable property.**

(*a*) Rights of common, rights of way and other profits in *alieno solo*, rents, pensions and annuities secured upon land, all these constitute an interest in immoveable property. *Ibid.* J

(*b*) Pensions and annuities not secured upon lands or houses or the like do not constitute an interest in immoveable property. *Ibid.* K

(8) **Personal incorporeal hereditaments.**

Incorporeal hereditaments, which are of a purely personal nature, and do not savour of the realty, are moveable property. 5 B. 322 (335). L

(9) **Land, meaning of.**

The legal meaning of land is not only dry land but also land covered by water. 5 C. 945=6 C.L.R. 269. M

(10) **Creation of new easements.**

It is not competent for owners of property in this country, by any arrangement made in their own discretion, to alter incidents of property which they possess, though the owners bind themselves to forego their rights for a specified time and definite purpose by a contract which may be enforced against them personally. 3 C.W.N. 126. N

1.—"Easement"—General.—(Continued).

(11) **Party wall.**

(*a*) Where the external walls of two neighbouring houses, which are now owned by two different persons, have been erected wholly on the same foundation wall, the presumption is that the line of demarcation of the two properties is that indicated by the superincumbent walls. 2 C.L.R. 377. **O**

(*b*) Two persons may be joint tenants of a wall. 6 M.H.C. 112. **P**

(12) **Common party wall.**

(*a*) Owners of a common party wall as are desirous of adding to or otherwise materially interfering with, the common property, must obtain beforehand the consent of the other to the change being effected. 19 M. 38. **Q**

(*b*) A common party wall cannot be built upon by either of the neighbours without the consent of the other. P. J. (1893), 373. **R**

(*c*) Opening of a door in a party wall common to adjoining owners is actionable. 16 A. 386. **S**

(13) **Easement to discharge smoke.**

(*a*) A right to discharge smoke through smoke holes in a wall over a neighbour's land can be acquired by prescription. Clause (d) of S. 28 expressly recognising the prescriptive right to pollute the air is also in favour of such an easement. 22 B. 831. **T**

(*b*) The obstruction of apertures in a person's house for the egress of smoke and ingress of air is actionable. 6 W.R. 86. **U**

(14) **Right to light.**

The only amount of light which can be claimed by prescription, without an actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house. Any amount beyond it can be acquired by grant though not by prescription. 3 B.L.R. (O.C), 18. **V**

(15) **Projection for purpose of ornamentation.**

There can be no prescriptive right to a projection, which has been erected merely for the purpose of ornamentation. 30 C. 503. **W**

(16) **Right of projecting roof on the neighbour's land.**

The projection of the roof of a house over a part of space belonging to the adjoining owner is of the nature of the ownership of the upper-chamber and ground-floor belonging to different persons; therefore, such right is of the nature of proprietory right rather than an enjoyment of mere easement. 3 B. 174. **X**

(17) **Right to project beams on neighbour's land.**

Where a person has acquired by easement, the right of projecting his beams over his neighbour's land; his right does not extend beyond the protrusion of the beams themselves; and the owner of the soil is *prima facie* entitled not only to the space below the beams but also to the space above them. 28 B. 428 = 6 Bom. L.R. 356. **Y**

(18) **Right to south breeze.**

A right to south breeze may be acquired by express grant; but it cannot be acquired merely by a presumption arising from user, whether such presumption is one of prescription or not. 3 B.L.R. (O.C), 18. **Z**

1.—"Easement"—General.—(Concluded).

(19) **Right of ferry.**

(*a*) A riparian owner's claim for exclusive right of private ferry, so far as it involves a right to embark and disembark passengers on the opposite bank, is really a claim to an easement. 6 C. 608 = 7 C.L.R. 504. A

(*b*) There appears to be nothing in law, which prevails in the mofussil of this Presidency, to prevent any private person from establishing a ferry and levying tolls from those who use the ferry. 6 C. 608 = 7 C.L.R. 504. B

(20) **Landlord building on his land.**

A landlord will not be prevented from building on his land merely because such building may obstruct the view of a neighbouring shop and cause diminution in the trade unless the neighbour has acquired an easement. 2 N.W.P. 169. C

(21) **Landlord and tenant.**

Permanent occupancy tenants of a zemindar, who were entitled to the soil subject to the payment of *thirva* or rent, were held to have acquired the easement of diverting water from a river by custom as against the zemindar. 18 M. 320. D

(22) **Permanent artificial stream—Right to uninterrupted flow of water.**

A right to the uninterrupted flow of water in a permanent artificial stream and also to the exclusive right to use the water throughout the length of the stream is an easement. 2 M. 46. E

(23) **Jalkar.**

Whatever may be the law under the Limitation Act of 1877, a Jalkar is not an easement within the meaning of S. 27 of the Act of 1871. 3 C. 276. F

(24) **Easement in water of rainfall.**

An easement can be acquired in regard to the water of the rainfall. 11 M. 16. G

(25) **Nature of 'emphyteusis.'**

Emphyteusis is an assignable inheritable right in a certain tract of land capable of yielding fruits, by virtue of which, and in return for the payment of a yearly quit-rent, the holder, during the continuance of the right, possesses absolutely the entire use and also the fruits thereof. 21 W.R. 344. H

(A).—Acquisition of Easements independently of the Acts of Prescription.

(1) **Easements—Act XV of 1877.**

(*a*) Act XV of 1877 does not exclude modes of acquiring easements existing independently of the Act. 15 A. 270. I

Easements—Act IX of 1871.

(*b*) Act IX of 1871 did not include or interfere with titles and modes of acquiring easements independently of that Act. 7 I.A. 240 (P.C). J

(B).—Customary Easements.

(1) **Right of privacy—Invasion.**

(*a*) To hold that privacy is a right and the invasion of it an injury would lead to the most alarming consequences to the owners of house property in towns. 5 B.L.R. (A.C.), 676. K

(B).—Customary Easements.—(*Concluded*).

(*b*) The right to disturb a neighbour's privacy by opening new windows, subject to the right of easement of others, should be recognised with reference to English Law and recent High Court decisions. 96 P.R. 1876. **L**

(*c*) The right of privacy to a dwelling house, having regard to the habits and the usages of the natives of this country, will be protected. 21 P.R. 1869. **M**

(*d*) A remedy cannot be granted on the invasion of privacy by opening new windows. 3 M.H.C. 141. **N**

(*e*) The invasion of privacy by opening windows is not a wrong for which an action will lie. 18 M. 163. **O**

(*f*) The right of privacy will not be allowed unless a special custom to that effect is proved. 9 B.H.C. (A.C.), 266. **P**

(*g*) See also 19 P.R. 1882, under S. 18, *infra*.

(2) **Lessee—Suit for disturbance of easement of privacy.**

A lessee or other person, who is in lawful possession of a house, may maintain an action, if an easement is disturbed such as the right of privacy. The term, "owner or occupier" will include such persons. 3 A.L.J. 670=A.W.N. (1906), 283=29 A. 64, 10 A. 358. **Q**

(3) **Right of prospect.**

No action lies for stopping a right of prospect, which is a matter only of delight and not of necessity. 3 M.H.C. 141. **R**

(4) **Tenant's right to cut wood and grass from the village *shamilat* for purposes of sale.**

(*a*) In a suit by hereditary tenants, claiming the right to cut wood and grass from the village not merely for their own agricultural purposes, feeding cattle, etc., but also for the purposes of sale, the Court dismissed the claim as the tenants had failed to prove that they had any such right by easement or by custom. 29 P.R. 1890. **S**

(*b*) Occupancy tenants have the right to graze their cattle on the village *shamilat* and this right continues to exist even after the partition of the *shamilat* among the proprietors. 119 P.R. 1889. **T**

(*c*) Customary easements—Right to cut brushwood to repair water course. See 31 P.R. 1882, under S. 18, *infra*. **U**

(C).—Easements in gross.

Neither the English nor the Indian Law recognizes such a right as an easement in gross. 20 A. 200. **V**

***2.*—"*Servient heritage.*"**

(1) **Servitudes—its recognition under Hindu and Mahomedan Law.**

The Laws of every country must necessarily recognize servitudes. It has been well said that the origin of servitudes is as ancient as that of property, of which they are modifications. It seems clear that servitudes were known and recognized by Hindu and Mahomedan Laws. 3 B.L.R.O.C. 18. **W**

(2) **Negative servitude—prescription.**

No negative servitude can be constituted by prescription but they may be acquired by grant. 3 M.H.C. 141. **X**

(3) **Positive and negative easements.**

In a prescriptive claim to positive easement, the acquiescence on the part of the servient owner is more easily proved than in that to negative easements. 6 B.L.R. 85. **Y**

Continuous and discontinuous, apparent and non-apparent, easements.

5. Easements are either continuous or discontinuous, apparent or non-apparent.

A continuous easement (1) is one whose enjoyment is, or may be, continual without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement (2) is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such sign.

Illustrations.

(*a*) A right annexed to B's house to receive light by the windows without obstruction by his neighbour A. This is a continuous easement.

(*b*) A right of way annexed to A's house over B's land. This is a discontinuous easement.

(*c*) Rights annexed to A's land to lead water thither across B's land by an aqueduct, and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.

(*d*) A right annexed to A's house to prevent B from building on his own land. This is a non-apparent easement.

(Notes).

1.—"continuous easement."

Right to uninterrupted flow of permanent artificial stream.

A right of a person to an uninterrupted flow of a permanent artificial stream to his land is a continuous easement. 2 M. 46. Z

2.—"An apparent easement."

An artificial water-course is an apparent easement.

Apparent servitudes are those the existence of which is shown by external works ; and an artificial water-course will come within the definition. 24 W.R. 345. A

Easement for limited time or on condition.

6. An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times (1), or between certain hours, or for a particular purpose (2), or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

(Notes).

1.—"at certain times."

(1) **Easement for a particular time during the year.**

(*a*) There may be a right by which the dominant owner is entitled to come on the servient tenement for a few days at one period of the year. 6 A. 497 (502). **B**

2.—"for a particular purpose."

(1) **Passage for boats during rainy season may be claimed as easement.**

(*a*) A right of passage of boats during rainy season may be claimed as an easement. 7 C. 145=8 C.L.R. 375. **C**

(*b*) A right of way may be limited to a particular season of the year alone. 10 W.R. 363. **D**

(*c*) There may be a right of way limited for particular seasons. P.J. (1877), 172. **E**

Easements restrictive of certain rights.

7. Easements are restrictions of one or other of the following rights (namely) :—

Exclusive right to enjoy.

(*a*) The exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy (1) and dispose of the same and all products thereof and accessions thereto.

Rights to advantages arising from situation.

(*b*) The right of every owner of immoveable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Illustrations of the Rights above referred to.

(*a*) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force (1).

(*b*) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(*c*) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(*d*) The right of every owner of land to so much light and air as pass vertically (2) thereto.

(*e*) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

Explanation.—Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the "subjacent and adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

(*f*) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over, or through his land, shall not, before so passing or percolating, be unreasonably polluted by other persons.

(*g*) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel (3), and all water on its surface which does not pass in a defined channel.

(*h*) The right of every owner of land that the water of every natural stream which passes by, through, or over his land (4) in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration (5) in quantity, direction, force, or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(*i*) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run (6) naturally thereto.

(*j*) The right of every owner of land abutting on a natural stream, lake, or pond to use and consume its water for drinking, household purposes, and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating (7) such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.

Explanation.—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only, and in a natural and known course.

(Notes).

1.—"The exclusive....to enjoy, &c."

(1) Owner's right to enjoy limited by Municipal Act.

Under the Bombay Municipal Corporation Act (III of 1888), the Bombay Municipal Corporation has power to enter upon lands belonging to private owners, to make connection between their main pipes and to lay the pipes forming connection through or under such lands, even without the owner's permission, provided reasonable notice is given to them. 23 B. 358. **F**

(2) Owner's right to build any structure on his land.

(*a*) Parties may build whatever structure they please on their land, *i.e.*, a Hindu temple, by the side of a mosque, provided that they do not interfere with the free enjoyment of the neighbour's property. 2 N.W.P. 182. **G**

(*b*) The general rule of Law is that the owner of one piece of land has a right to it in the natural course of user; unless, in doing so, he interferes with some right created either by law or by contract. 23 M. 389. **H**

(3) Right of owner to build a ridge on his land.

A person has a natural right, as owner of land, to raise a ridge on his own land, adjoining a highway, so as to prevent water flowing from such highway into his garden; and the Municipality will be guilty of trespass and liable for damages, if it removes the ridge so put up. an injunction may be granted restraining such illegal Act. 1 M.L.T. 333. **I**

(4) Landlord building on his land.

See 2 N.W.P. 269, under S. 4, *supra*.

I.—"The exclusive.... to enjoy, &c."—(Continued).

(5) **Easement of discharging water.**

A right of easement to allow the water from the plaintiff's *mori* and roof to fall on the defendant's land will not entitle the plaintiff to claim that the land shall be kept open and unbuilt. The defendant can build making necessary arrangements to receive the water from the *mori* and roof and to carry it away. 20 B. 788. **J**

(6) **Easement of discharging smoke—Building on the servient tenement.**

An injunction to restrain the servient owner from building on his land so as to interfere with the right of easement to discharge smoke over such land may be granted. 22 B. 831. **K**

(7) **Right to hold a market on one's own land.**

Any man may set up a market, whenever he chooses, on his own land, and may invite persons to come there for purpose of selling goods. 17 C. 458. **L**

(8) **But Magistrate may make an order to prevent riot.**

Any person is entitled to establish a market on his own land, and the owner of a neighbouring market has no right of suit for the loss which may ensue from the establishment of the new market. This right is subject to the order of a Magistrate to prevent riot, etc. 6 N.W.P. 104. **M**

(9) **But prohibition cannot be for indefinite period.**

The prohibition to hold a market on a particular day cannot be for an indefinite period. 17 A.W.N. 50. **N**

(10) **Power of Magistrate to order removal of hat to a distance.**

A Magistrate has no jurisdiction to pass an order directing one of two rival *haut* (market) proprietors to remove his *haut* to such a distance as to render it useless for the purpose for which it is established; it might be set aside as in excess of jurisdiction. 4 C.L.R. 410. **O**

(11) **Dispute among rival *haut* proprietors.**

Where a plaintiff alleges that he had been holding a *haut* on his own land for many years, that the defendant's setting up a rival *haut* on the same days led to disturbances which resulted in an order by the Magistrate, prohibiting him from holding the *haut* on those days, and that he has suffered loss in consequence, he would, if the facts are true, be entitled to a decree declaring his right, as against the defendant, to hold the *haut* on those days. 5 C. 7 (F.B.)=4 C.L.R. 309. **P**

(12) **Grant of taluq upon which a *haut* used to be held—whether a monopoly.**

Although the Government settles a taluq, upon which a *haut* has been held for many years, the Government only grants the lands included in the taluq. Such a settlement does not imply a monopoly, which will enable the holder to restrain other persons from setting up a market anywhere close by. 17 C. 458. **Q**

(13) **Chopping the branches of tree overhanging another's land.**

(*a*) A tree within the enclosure of a temple overhangs the plaintiff's property. The plaintiff was held to have the right of cutting such branches as overhang his house, and the fact that the tree was an object of veneration to many people will not be material. 24 A. 499. **R**

1.—"The exclusive..to enjoy, &c."—(Concluded).

(*b*) Right to remove the branches of the neighbour's tree overhanging the land of another, as also the roots. See 19 B. 420 and 31 C. 944, under S. 15, *infra*. S

(14) **Right to set up a ferry on one's own land as also over another's property.**

It is a recognised law in this country, that a man may set up a ferry on his own property, and take toll from strangers for carrying them across; and he may acquire such a right, by grant or by user, over the property of others. 19 C. 253 (P.C.) T

(15) **Right of pasturage by tenant.**

Cultivating tenants may claim, by immemorial use, a right of pasturage over the waste land of the landlord and such a right is not a right in gross. 8 C.W.N. 425 (P.C.). U

(16) **Obstruction of public thoroughfare.**

Where the plaintiff, the owner of a premises adjoining a highway, has been obstructed from having access to it by the municipal authorities, the plaintiff has a civil remedy as he has suffered special damage from the act of the municipality. 1 A. 557. V

2.—"The right....to so much light....as passes vertically."

(1) **No natural right to lateral light and air.**

(*a*) There is no natural right to light and air coming laterally to a man's tenement, *i.e.*, coming over the land of another. Such a right can only be acquired by an easement. 2 B. 660. W

(*b*) Until a right to easement of light and air has been acquired, the adjoining owner has a right to build on the land belonging to him, notwithstanding that such building obstructs the light and air. 2 B. 660. X

(2) **Such a right can only be acquired by grant or prescription.**

A right to light and air is a right which can only be acquired by grant, prescription or estoppel; it may certainly be reserved but it is not in any sense an inherent right of property. 10 A. 358 (377). Y

3.—"water....which does not pass in a defined channel."

(1) **Water not running in a defined channel is absolute property of owner.**

Water, not running in a defined channel, is the absolute property of the owner of the land of which it forms part, and, before it has reached a defined stream, he may drain it off or put it to such purposes as he pleases. 7 M.H.C. 37 (46). Z

(2) **Prescriptive right to keep water standing on another's land.**

A prescriptive right to throw back water and keep it standing on the land of another exists only in the case of water flowing in a defined stream, and cannot apply to surface water not flowing in such a stream, though it might ultimately, if not arrested, flow into a tank. 7 M.H.C. 37 (46). A

(3) **Damage caused by collecting water on one's land.**

Where rain water accumulated on defendant's land, as the result of the digging of trenches by him, which was done in the usual and proper course of the enjoyment of the land, and such rain water percolated and caused subsidence of the plaintiff's house, the defendant was held not to be liable. 28 B. 472. B

3.—" water....which does not pass in a defined channel."—(Concluded).

(4) What must be proved before defendant can be held liable for such damage.

Before a person can be held liable in damages, for injury caused to his neighbour's lands, by water, either flowing from the former's land to the latter, or percolating from one into the other, it must be shown that the water was brought or collected on his land by him, voluntarily, for his own purpose, in a non-natural user of it. Otherwise, he is not liable. 28 B. 472. C

4.—" right of every owner....that water of natural stream which passes by his land."

(1) Stream defined.

A stream of water is water which runs in a defined course; nor is a perennial flow a necessary condition to the legal conception of a stream, provided the source, though irregular, be one of constant recurrence, and not merely fortuitous or temporary. 28 B. 105 (118). D

(2) Natural stream defined.

A natural stream is one which has a natural source and flows in a natural channel. 18 M. 320. E

(3) Riparian owners—English and Indian Law.

The law in regard to riparian owners is the same in India as in England. 23 B. 506. F

(4) Natural channel—Right of riparian owners to reasonable enjoyment.

(*a*) Each successive riparian owner is entitled to the unimpeded flow of water in a natural channel, and to its reasonable enjoyment, as it passes through his land, as a natural incident to his ownership of it. 4 C. 633 (**P.C.**). G

(*b*) Riparian owners are entitled to a reasonable use of the water in a natural stream, and the share of each will be equal in the absence of evidence as to the exact share enjoyed by each. 49 P.R. 1888. H

(5) But the enjoyment must not cause damage to others.

(*a*) Every successive riparian proprietor is entitled to the reasonable enjoyment of the water of a river flowing in a natural channel as it passes by his land, but must so use it as not to damage the other cultivators also entitled to use it. L.B.R. (1872-1892), 233. I

(*b*) Each riparian owner has a right to the usufruct of the stream which passes through his lands, subject to the similar right of all the proprietors of the banks on each side to the reasonable enjoyment of the same. 29 B. 357=7 Bom. L.R. 265. J

(*c*) A riparian owner, where a stream flows in a channel down from a property higher up, is entitled to the flow of water without interruption and without substantial diminution caused by the upper proprietor, who may, for legitimate purposes, withdraw so much only of the water as will not materially lessen the downward flow on o his neighbour's land. 24 C. 865 (**P.C.**) K

(*d*) A riparian proprietor may deal with a stream as freely as with any other portion of his land, provided only that he must not, by so doing, sensibly disturb the natural condition of the stream as it exists within the limits of other proprietors, whether above or below, or on the opposite side. 3 W.R. 218. L

4.—" right of every owner..that water..land."—(Continued).

(*e*) If the flow of water is a natural one, in a defined course from somewhere outside the plaintiff's land, through his land, he must allow it to pass. He can only enjoy just the same right as all other persons similarly situated, namely, the right to make a reasonable use of the water as it passes. 18 W.R. 525. **M**

(6) Riparian owner can convert dry into wet lands.

An upper riparian owner is entitled to the reasonable use of water in a channel, which includes the use of water for the conversion of dry lands (punjah) into wet land (nanja) ; provided that he does not interfere with the right of the lower riparian proprietors. 1 M.L.J. 167. **N**

(7) Natural streams augmented by other means—Riparian owner's rights.

Where an owner of land has the right to a natural stream as an incident to his holding land, he has a right to all water, which actually forms part of the stream, as soon as it becomes a part, whether such water comes by ordinary natural means, (as from springs, or from the surface of the adjacent soil, or from drains), or is added by percolation from the artificial channel of a canal ; and, if the natural water has, by percolation, augmented the streams and became part of it, no distinction can be made between the original natural stream and the accession to it. 28 B. 105. **O**

(8) Riparian owner has no right to divert water to lands not adjoining a stream.

The owner of a tenement, adjoining a natural stream, has no right to divert water to a place outside the tenement and there consume it, even though he does not thereby diminish the flow of water to the lower riparian owner ; and, in such a case, the lower riparian owner can succeed without proving damage or diminution in the flow of water. 28 M. 236. **P**

(9) Proof of special damage.

Where rights of water are concerned and where general damage is proved by interference with the right of water, which a party formerly possessed, there is no necessity to put down in detail the exact amount of damage which the complaining plaintiff supposed himself to have sustained. 11 W.R. 254. **Q**

(10) The quantity of water which can be abstracted by a riparian owner.

What quantity of water can be abstracted and consumed, without infringing the rights of the lower riparian proprietors, must, in all cases, be a question of circumstances depending mainly upon the size of the river or stream, and the proportion which the water abstracted bears to its entire volume. 24 C. 865 (**P.C.**)=24 I.A. 60. **R**

(11) Rights of riparian owner to open a new conduit.

The right to take water is governed by established usage. No man can open a new conduit to take additional water to the injury of his neighbours. 4 W.R. 28. **S**

(12) Riparian owners—Custom of taking water by turns.

It is not unusual, in this country, for each of those, who own lands adjacent to streams, depending upon them for irrigation, to take water by turns either for a certain number of days or for hours. 18 M. 320. **T**

4.—"right of every owner..that water..land."—(Continued).

(13) **Right of riparian owners—Ordinary and extraordinary use.**

(*a*) Every riparian owner has a right to the ordinary use of water, running in a natural channel, without regard to the effect, which such use may have, in case of deficiency, upon proprietors lower down the stream. But, in the case of extraordinary use, he must not interfere with the right of other proprietors. 11 C.W.N. 85=4 C.L.J. 370. **U**

(*b*) By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land. Further he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill or divert the water for purposes of irrigation. 18 M. 320. **V**

(14) **Riparian owners—Erecting water-mill.**

Where a riparian owner does not injure others below him, who have a right to use the stream, he is at liberty to erect a water-mill on his own ground. 12 P.R. 1867 (Revenue). **W**

(15) **Right to exclusive use of water is not a natural right.**

A riparian proprietor can only have a right to the lawful use of the water, flowing through his land, subject to the similar rights of other riparian proprietors. But a claim to the exclusive use of the water of a natural stream is not a natural right but a claim to an easement. 20 M. 279. **X**

(16) **Riparian owner—Right of draining water of the land in the stream.**

(*a*) The right of an upper riparian proprietor to drain the water of his land into the stream, which carried the water into another stream (the parties also being riparian owners of it), is a natural right; and an interference with such right, unless an easement to infringe the right has been acquired, is actionable even without proof of special damage; so long as the obstruction continues, there is a running cause of action from day to day. 1 M. 335. **Y**

(*b*) Where there exists a natural water-course, the upper owner will have a right to have discharged, through it, the rainfall on his land and the lower owner could not erect a bund on it so as to interfere with this right. This right is a natural right. 7 W.R. 498. **Z**

(*c*) It is an ordinary right to have the water falling on one's land in a higher level run over the adjoining land in a lower level. 20 W.R. 287. **A**

(17) **Drainage—Artificial water-course.**

See 7 W.R. 498, under S. 15, *infra*.

(18) **Such a right to drain water may be abandoned.**

The natural right of an upper owner to discharge the rain water on the land of another through a natural water-course may be abandoned expressly or impliedly. 7 W.R. 498. **B**

(19) **Easement to divert water through the defendants' land can be acquired by prescription.**

An easement to cause the water of a river to flow through the servient tenement to the dominant tenement by means of bunds erected on the latter can be acquired by prescription. 30 C. 1077. **C**

4.—"right of every owner..that water..land."—(Continued).

(20) **Riparian owners have no right to dam water back.**

(*a*) Each riparian proprietor has a right to a reasonable use of the water as it passes his land, but, in the absence of some special custom or easement, he has no right to dam it back or exhaust it so as to deprive other riparian owners of like use. 23 B. 506. **D**

(*b*) A lower riparian owner has no right to obstruct the flow of a stream and to force back the water so as to obstruct the drainage of an upper riparian owner's land, unless he has acquired an easement to do so. Such obstruction is actionable, even without proof of any special damage, because the injury to the right imports a damage and so long as the obstruction continues, there is a continuous cause of action from day to day. I M. 335. **E**

(*c*) Where the effect of a bund erected by plaintiff, a riparian owner, was to throw upon the land of the defendant more water than has customarily flowed on to it and of thus increasing the damage to which he has hitherto been subject, the plaintiff will not be entitled to an injunction restraining the defendant from interfering with the erection of a bund. 14 M.L.J. 162. **F**

(*d*) Where the surplus waters of a tank, belonging to two adjacent owners of land, have, from time immemorial, been discharged in an artificial watercourse, so as to overflow certain land of both the parties, an agreement must be inferred, as between the owners, to the effect, that neither can interfere with the accustomed flow of the surplus water so as to increase the burden of the other. So the plaintiffs was held not to be entitled to erect a bund to protect his land from the water as it would cause injury to the defendant's land. 27 M. 409. **G**

(21) **But where reasonable flow of water is allowed to pass, embankment may be retained.**

But, so long as a reasonable flow of water is allowed to pass, a riparian owner who has raised an embankment will be allowed to retain it, though it intercepts the flow of water downwards. 33 P.R. 1867. **H**

(22) **Bunds may be erected, if necessary to prevent owner's land from being flooded.**

Where a riparian owner erected certain bunds, in order to prevent his land from being flooded, which caused the stream to overflow the lands of another situated lower down the stream, such action was held not to be actionable, because it was not reasonably practicable to protect the land by other means. 18 M. 158. **I**

(23) **But in case of ordinary floods protection of one's land must not cause injury to others.**

(*a*) The law does not, except in cases of extraordinary floods, give any large powers of protection to riparian owners. They have a right to protect their lands with reference to ordinary floods, only if they do so without injury to others. 27 M. 409. **J**

(*b*) The course of a stream, in times of ordinary flood, should not be changed or obstructed for the benefit of one class of persons to the injury of another; but there can be no liability in respect of extraordinary floods. 27 M. 409. **K**

4.—" right of every owner..that water..land."—(*Concluded*).

(*c*) In the case of a sudden and extraordinary casualty, such as an uncommon and extraordinary flood, a riparian owner has the right to protect himself against it; but, in cases where the casualty is of common occurrence and expected, a riparian owner should adopt protective works which will not hurt his neighbour. 18 M. 158. **L**

(24) **Protection of land against the inroads of sea.**

Every land owner, exposed to the inroad of the sea, has the right to protect himself by erecting such works, as are necessary for that purpose; and, if he acts *bona fide*, he is not liable for any damage, occasioned to his neighbours, who must protect themselves. 27 M. 409. **M**

(25) **Right to raise a dam above the calingula of a tank.**

The defendant, the holder of land situated below a tank, erected a dam above the calingula of the tank, the effect of which was, that an increased amount of water was collected and stored in the tank, and water was thereby thrown back upon the plaintiff's land, and caused injury to it at certain seasons. *Held*, the defendant had acquired such an easement by prescription and that he had not exceeded his rights. 24 M. 202. **N**

(26) **Riparian proprietors not bound to construct artificial works for benefit of neighbours.**

Under the common law of this country, there is no liability cast upon a riparian proprietor, to construct artificial works, or keep them in repair, in order to confer a benefit upon his neighbours by protecting their lands from inundations. 7 C. 505. **O**

(27) **Artificial water course—Right of easement over it.**

The proprietors of a pyne have a clear right to allow or deny water, flowing through that pyne to other persons, unless they have also a clearly defined right, which enables them to control the water, and convert it to their own use. It must be clearly established that the right originated in some grant or valid contract, or that the right has been exercised for so long a period that such a title may be presumed. 14 W.R. 349. **P**

(28) **Jurisdiction of Forest officer—S. 11, Madras Forests Act.**

A Forest Settlement Officer, under S. 11 of Act V of 1882 (Madras Forest), has jurisdiction over a claim, in respect of water flowing in a defined channel on a Government land. 20 M. 279. **Q**

(29) **Diversion of water—Question of fact, jurisdiction of Mamlatdars, Bombay.**

What would constitute an unreasonable diversion of the water, such as to disturb the use of the lower riparian owner, would be a question of fact, which, in Bombay, would have to be decided by the Mamlatdar according to the circumstances of the case. 23 B. 506. **R**

(30) **Irrigation works—Maintenance of old works and construction of new ones—Government's power.**

So far as the construction of new irrigation works is concerned, the authority of the Government is but permissive, while, as regards the maintenance of works that are completed, so as not to interfere with the existing rights of other persons, the authority of the Government is imperative. In the former case, the legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others. 28 M. 72=15 M.L.J. 32. **S**

5.—"material alteration."

The collection of water from different points into one channel whether material alteration.

The collection of water, which formerly flowed from a large tract of land at different points, into a definite channel, and the throwing of it all into a particular point of the plaintiff's channel, is a material alteration in the mode of the passage of the water, for which the plaintiff will be entitled to relief, though the quantity of water is not affected. 28 M. 15. **T**

6.—"The right...that water...shall be allowed...to run."

(1) **Drainage of lands on a higher level.**

(*a*) There is a well recognised servitude of lower lands to receive the natural drainage of adjoining lands on a higher level. Where the waters from plaintiff's land have been accustomed to escape in a particular direction and by certain separate passages across the defendant's lands, the defendant cannot do anything which will interfere with the plaintiff's right in this respect. 8 C. 468. **U**

(*b*) The owner of a higher land has the right to drain its surplus rain water through the adjacent lower ground. 12 C. 323. **V**

7.—"The right of every owner...abutting on a natural stream...for irrigating."

Riparian owner's right to irrigation of lands abutting on stream.

(*a*) This illustration clearly shows that a riparian owner has the right to use and consume water for irrigating the land abutting on a natural stream, provided that he does not thereby cause material injury to other like owners. 29 B. 357=7 Bom. L.R. 265. **W**

(*b*) The occupants of a land abutting on a natural stream, whatever the nature of their tenancy may be, are entitled to the enjoyment and benefit of water as it flows past. The Government has no right to interfere with that right. 7 B. 209. **X**

(*c*) Every owner of adjacent soil has the right of a riparian proprietor to the usufructuary interest in the water of a stream, and it follows that, whatever may be the nature of tenancy, he, as the owner of land abutting on the stream, is entitled to the enjoyment and benefit of the water as it flows past, even as against the Government. 28 B. 105. **Y**

(2) **But he cannot thereby interfere with the rights of others.**

(*a*) Although proprietors of a village or estate, through which a water-course passes, have the right to make use of water for irrigating purposes, they must do so only to such extent as will not interfere with similar rights possessed by parties holding land lower down on the same water-course. 11 W.R. 254. **Z**

(*b*) An upper riparian proprietor cannot, by putting up a dam at a point in the stream where his land abuts on it, use the water so as to interfere with the rights of the lower riparian proprietors. In the absence of any right, acquired by prescription, he can, as an ordinary riparian proprietor, direct the water for the purposes of irrigation, without violating the rights of and, inflicting material injury upon, other riparian proprietors. 6 Bom. L.R. 291 (293). **A**

(3) **Conditions imposed on the use of water by riparian owners.**

Riparian owners are entitled to use and consume the water of a stream for drinking and household purposes for watering their cattle, irrigating their land, and for purposes of manufacture subject to the conditions,

7.—"The right of every owner..abutting on a natural stream..for irrigating."—(Concluded).

(1) that the use is reasonable, (2) that it is required for their purposes as owners of the land, and (3) that it does not destroy or render useless or affect the application of water by the riparian owners below the stream in the exercise of their natural right of their right of easements, it any. 3 L.B.R. 23. **B**

(4) Irrigation of non-riparian tenements—not allowed.

A person, who is not a riparian owner, cannot use the water of a natural stream for irrigating land, which cannot be described as part of the riparian tenement. 29 B. 357=7 Bom. L.R. 265. **C**

(5) Infringement of riparian owner's right—when actionable.

A riparian owner has the right to take water from a natural stream to irrigate his lands. If there be an infringement of this right, it is not necessary to maintain an action to show that there was any subsequent injury consequent upon such infringement. 23 W.R. 230. **D**

(6) Right of riparian owners—removal of a bund.

To entitle a person for the removal of an embankment, constructed in a channel on defendant's own land, there must be an actual infringement of the plaintiff's right, and not merely some act by which that right is denied or questioned. 11 W.R. 2. **E**

(7) Artificial water-course.

The riparian proprietors have the right to use of water of a natural water-course under certain restrictions. But these rights have no application to a water-course artificially constituted, and the mere fact of riparian proprietorship gives no right whatever over such a stream. 6 W.R. 99. **F**

CHAPTER II.

THE IMPOSITION, ACQUISITION, AND TRANSFER OF EASEMENTS.

Who may impose easements.

8. An easement may be imposed by any one (1) in the circumstances, and, to the extent, in and to which he may transfer his interest in the heritage (2) on which the liability is to be imposed.

Illustrations.

(*a*) A is tenant of B's land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. A may impose an easement on the land to continue during the time that the lease exists, or for any shorter period.

(*b*) A is tenant for his life of certain land with remainder to B absolutely. A cannot, unless with B's consent, impose an easement thereon which will continue after the determination of his life-interest.

(*c*) A, B, and C are co-owners of certain land. A cannot, without the consent of B and C, impose an easement on the land, or on any part thereof.

(*d*) A and B are lessees of the same lessor, A of a field X for a term of five years, and B of a field Y for a term of ten years. A's interest under his lease is transferable; B's is not. A may impose on X, in favour of B, a right of way terminable with A's lease.

(Notes).

1.—"An easement may be imposed by any one."

(1) **Government's creation of easements in favour of Railway Company.**

Statutory powers, granted to a Railway Company for the construction of works, must be exercised with ordinary care and skill, and with some regard to the property and rights of others. They are granted under the condition, sometimes understood, sometimes expressed, that such a body shall do as little damage as possible in the exercise of their powers. 27 B. 344. G

(2) **Right of private fishery can be granted only by Government.**

Any private right of fishery, if it exists at all, must be derived from the Crown, and such right must be established by clear evidence, as the presumption will be against any such right. 4 C. 53. H

(3) **Right of ryotwari tenant to supply of water based on contract not on easement.**

The right of ryotwari tenants to the supply of water, being founded on a contract, and not being an easement, an action lies against the Government in case of improper withholding of water. 24 M. 36=10 M.L.J. 249. I

(4) **Breach of implied contract by Government for the supply of water.**

Held, that the landlord (Government) has not broken the implied contract for the continuance of existing arrangements for the supply of water to irrigable land let to ryotwari holders of Government, as the evidence did not show any diminution in the supply of water to which the plaintiff was entitled. 7 M.H.C. 342 (346). J

(5) **Construction of grants—General words.**

One of two houses, belonging jointly to several owners, possessed an easement of light and air over the other. *Held*, on a partition of the houses, the dominant tenement must continue to enjoy the easement, which was a continuous one, both by implication of law, and by the general words of the grant. 8 B.H.C. (O.C.), 181. K

(6) **Construction—General words in a conveyance of part of property—English Law.**

In England, in consequence of a severance of unity of possession such general words of grants as "together with all ways now used or enjoyed therewith" or "as with all rights, members or appurtenants belonging or occupied or enjoyed as part, parcel or member thereof", are used, the distinction between a continuous and a discontinuous easement does not apply, and a right to use any made or visible path over other land of the grantor, which, at the date of the grant, was in fact used for access to the land conveyed passes under such general words. 15 A. 270 (297). L

(7) **Construction of grant--"appurtenant" or "belonging."**

The words "appurtenant" or "belonging" will ordinarily carry only actually existing easements. 7 C. 665. M

(8) **Where besides "appurtenant" or "belonging," further words are used.**

Where, besides "appurtenant" or "belonging" further words, such as, "therewith held or used", are inserted, these words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession, as well as a way which, during unity of posses-

1.—"An easement may be imposed by any one."—(Continued).

sion, has never existed as an easement but in fact used for the convenience of one of the tenement afterwards severed. But those words will not include a way which, during the unity of possession, was used for the greater convenience of the owner himself. 7 C. 665. **N**

(9) **Appurtenant in a grant may include a right of way in favour of grantor.**

See 15 A. 270, under S. 13, *infra*.

(10) **Construction of a Marathi sale deed—"rights and accompaniments."**

Where a Marathi deed of sale conveyed a piece of land with "all rights and accompaniments", such word cannot be held to include a right of way over the vendor's property as conveyed along with the portion of the land sold. 19 B. 797. **O**

(11) **Construction of contracts—Grant of easement by mortgagor to mortgagee.**

Where a mortgage instrument grants a privilege exercisable over the property in possession of the mortgagor to the mortgagee, such a privilege must be regarded as ancillary to the use of the house transferred, and not as a mere license. 18 B. 382. **P**

(12) **Owner wishing to retain any right over portion alienated.**

Where the owner of a tenement, granting a portion of it to another, wishes to retain any right over it, he must retain such right expressly; but he cannot retain a right of way or other easement of necessity, without which the enjoyment of the tenement granted cannot be had. 60 P.R. 1888. **Q**

(13) **Implied grants by landlord to tenant.**

(*a*) In letting irrigable land, with existing conveniences for the supply of water for the purposes of irrigation, the landlord impliedly engages, if nothing to the contrary is expressed, that the existing arrangements for the supply of water will not be interfered with, to the prejudice of the tenant, during the continuance of the tenancy. Where the tenancy is from year to year, it may be taken that this engagement is yearly renewed. 7 M.H.C. 60 (64). **R**

(*b*) Where a landowner granted land for building purposes to *fazendari* tenants, on a perpetual tenure at quit rent, and where the owner sells land out and out for building purposes, the Court is entitled to presume a covenant on the part of the landowner, from the evidence adduced, that a vacant piece of ground close to the land granted and belonging to the *fazendar* must be kept open for the use of the tenants. 17 B. 648. **S**

(14) **Implied grant of easements on grant of land for building.**

Where a grant of land for building purposes is made by the owner of the adjoining house, a right of support from the adjacent and subjacent soil and from adjoining building arises by implied grant, in the absence of express stipulation. 60 P.R. 1888. **T**

(15) **Quasi easements.**

Whilst a man cannot subject one part of his property to another by an easement, he can obtain the same object by another right, the general right of property, and if the alteration he makes, before alienation of any part of it, are palpable and manifest, and in their nature permanent changes, in the disposition of property, so that one part thereof becomes

1.—"An easement may be imposed by any one."—(Concluded).

dependent on another, the purchaser of either part must take the land burdened or benefited, as the case may be, by the qualities, which the previous owner had undoubtedly the right to attach to it. 24 W.R. 345. U

2.—"to the extent in and to which he may transfer his interest in the heritage."

(1) **Absolute deprivation of power of alienation.**

(*a*) An agreement entered into on partition, that no co-sharer should alienate his share, was held to be inoperative and the co-sharer had full powers of alienation. 6 M.H.C.R. 356. V

(*b*) According to Hindu Law, the introduction of a condition against an alienation, in a grant absolute to Brahmins, is inoperative. 4 M. 200. W

(2) **Transfer of easement—Necessity for registration.**

An easement of light and air is immoveable property within the meaning of the Registration Act, and therefore a transfer of it requires registration. 20 B. 704. X

(3) **But transfer of a chance of acquiring easement requires no registration.**

But the mere chance of acquiring an easement is not immoveable property and no pecuniary value can be placed upon it. No registration is necessary for the transfer of such a chance. 20 B. 704. Y

(4) **Easement by oral agreement, enforceability of.**

Where an oral agreement for easement has been acted upon for a long time, such an oral agreement can be enforced. 4 M.H.C. 98. Z

(5) **Grant of easement—Whether writing necessary—English Law.**

The Law of this country does not require that a creation of such an incorporeal right as an easement should be in writing. But the English Law, which requires, that such creation should be under a grant in writing and under seal, is due entirely to reasons derived from feudal and statute law. 4 M.H.C. 98. A

(6) **Whether writing necessary—Indian Law.**

In this country, where there is no such legislative enactment in existence as the Statute of Frauds in England, titles to properties have passed and can still pass from one person to another by virtue of a contract not reduced to writing. 9 W.R. 351. B

(7) **Whether writing necessary.**

There is nothing in S. 13 of Act XVI of 1864 (Registration), which says that no contract purporting to create or transfer any right, title or interest in land, shall be recognised by Civil Courts, unless reduced to writing. 9 W.R. 351. C

(8) **Destination du pere de famille.**

(*a*) The French legal title of *Destination du pere de famille* signifies the services which one part derives from another before an alienation. When, by sale or otherwise, the property is made the property of different owners, such services become servitudes. 24 W.R. 345. D

2.—" to the extent in and to which he may transfer his interest in the heritage."—(Concluded).

(*b*) The analogy of the disposition of the owner of two tenements to the *destination du pere de famille*, if it be worth grave attention, fails when the owner of two tenements sells and conveys for an absolute estate therein, for he puts an end by contract to the relation which he had himself created, between the tenement sold and adjoining tenement; and the condition of such tenement is thenceforth determined by the contract of alienation and not by previous user of the vendor during such joint ownership. 18 B. 616 (627). E

Servient owners.

9. Subject to the provisions of section 8, a servient owner may impose on the servient heritage any easement that does not lessen the utility (1) of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

Illustrations.

(*a*) A has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon, of the water of B's stream. B may grant to C the right to divert the water of the stream from noon to sunset; provided that A's supply is not thereby diminished.

(*b*) A has, in respect of his house, a right of way over B's land. B may grant to C, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: provided that A's right of way is not thereby obstructed.

(Notes).

1.—" a servient owner may impose....any easement that does not lessen the utility, &c."

(1) **The principle of this section applies to rights by custom.**

Where, in a waste land belonging to a zemindar, the plaintiffs, Hindus, claimed the right to burn the *Holi* at the time of the *Holi* festival, existing not as an easement, but by custom, it was held that such a right would not entitle the plaintiffs to object to the defendants' (Mahomedans') using the land, at the time of the Muharam, for the erection of *tazias*. 6 A. 497. F

(2) **Exercise of a right of way by several persons.**

Where many persons have a right of passage over a lane, one of them must not, any more than the owner of the soil might, use it in an excessive or improper manner so as to obstruct the exercise by others of their rights. 7 C. 665. G

Lessor and mortgagor.

10. Subject to the provisions of section 8, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a

lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

Explanation.—A security is insufficient within the meaning of the section, unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

(Note).

Extension of Section.

Principle extended where Act not in force.

Though S. 66 of the Transfer of Property Act and S. 10 of this Act are not in force in the Punjab, the Court, when giving a decision on matters which are dealt with by those sections, should follow them, as they are in consonance with equity, good conscience and justice. 124 P.L.R. 1902. H

Lessee.

11. No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.

Who may acquire easements.

12. An easement may be acquired by the owner of the immoveable property for the beneficial enjoyment (1) of which the right is created, or on his behalf, by any person in possession of the same.

One of two or more co-owners of immoveable property may as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immoveable property can acquire for the beneficial enjoyment of other immoveable property of his own, an easement in or over the property comprised in his lease(2).

(Notes).

1.—"beneficial enjoyment."

Way of necessity—Extreme inconvenience.

The question whether, in this country, a Court might recognise a way of necessity in case of extreme inconvenience of approach by another possible way was referred to, but was not considered in. 19 B. 797. I

2.—"No lessee can acquire....an easement....over property comprised in his lease."

(1) **Acquisition of easement by prescription—Landlord and Tenant.**

(*a*) A tenant of a land cannot acquire an easement by prescription in other lands of his lessor, although the tenant has permanent rights of tenancy in the land. 9 C.W.N. 856. **J**

(*b*) A tenant, though having permanent rights of tenancy, cannot acquire an easement by prescription in other land of his lessor. 29 C. 363. **K**

(*c*) An easement implies an absolute grant to some person of an incorporeal right as appurtenant to his corporeal tenement. Such a grant cannot be conceived as made to a mere tenant, in respect of a tenement, in which his interest is precarious. In other words there can be no easement by a tenant as against his landlord. 7 M.H.C. 60. **L**

(*d*) A tenant cannot, by user, obtain a right of way against his landlord, over other lands belonging to his landlord. 14 A. 185 (F.B.). **M**

(2) **But tenant entitled to way of necessity over landlord's land.**

A tenant cannot acquire a right of way by user against his own landlord; but a tenant is entitled to a way of necessity over the adjoining land of his landlord. 1 C.W.N. 151. **N**

(3) **Tenants of the same landlord—Acquisition of easement by one tenant against another.**

It is doubtful whether one tenant can acquire a prescriptive right of easement against another tenant. 1 C.W.N. 151. **O**

(4) **House let to tenant—Rights incidental to house how affected.**

Where a right of user of a drain or passage is incidental to a house, that right is not affected by the owner of the house letting the house to a tenant. 6 W.R. 314. **P**

Easements of necessity and *quasi*-easements.

13. Where one person transfers or bequeaths immoveable property to another,—

(*a*) if an easement in other immoveable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled (2) to such easement; or

(*b*) if such an easement is apparent and continuous, and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(*c*) if an easement in the subject of the transfer or bequest is necessary for enjoying other immoveable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled (3) to such easement; or

(*d*) if such an easement is apparent and continuous (4), and necessary for enjoying the said property as it was enjoyed when the

transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint-property (5) of several persons,—

(*e*) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement; or

(*f*) if such an easement is apparent and continuous, and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (*a*), (*c*), and (*e*), are called easements of necessity (1).

Where immoveable property passes by operation of law (6), the persons from and to whom it so passes are, for the purpose of this section to be deemed, respectively, the transferor and transferee.

Illustrations.

(*a*) A sells B a field then used for agricultural purposes only. It is inaccessible except by passing over A's adjoining land, or by trespassing on the land of a stranger. B is entitled to a right of way, for agricultural purposes only, over A's adjoining land to the field sold.

(*b*) A, the owner of two fields, sells one to B, and retains the other. The field retained was at the date of the sale used for agricultural purposes only, and is inaccessible except by passing over the field sold to B. A is entitled to a right of way, for agricultural purposes only, over B's field to the field retained.

(*c*) A sells B a house with windows overlooking A's land, which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land.

(*d*) A sells B a house with windows overlooking A's land. The light passing over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards A sells the land to C. Here C cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in A's hands.

(*e*) A is the owner of a house and adjoining land. The house has windows overlooking the land. A simultaneously sells the house to B, and the land to C. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here A impliedly grants B a right to the light, and C takes the land subject to the restriction that he may not build so as to obstruct such light.

(*f*) A is the owner of a house and adjoining land. The house has windows overlooking the land. A, retaining the house, sells the land to B, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. A is entitled to the light, and B cannot build on the land so as to obstruct such light.

(*g*) A, the owner of a house, sells B a factory built on adjoining land. B is entitled, as against A, to pollute the air, when necessary, with smoke and vapours from the factory.

(*h*) A, the owner of two adjoining houses, Y and Z, sells Y to B, and retains Z. B is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Y as it was enjoyed when the sale took effect, and A is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Z as it was enjoyed when the sale took effect.

(*i*) A, the owner of two adjoining buildings, sells one to B, retaining the other. is entitled to a right to lateral support from A's building, and A is entitled to a right to lateral support from B's building.

(*j*) A, the owner of two adjoining buildings, sells one to B, and the other to C, C is entitled to lateral support from B's building, and B is entitled to lateral support from C's building.

(*k*) A grants lands to B for the purpose of building a house thereon. B is entitled to such amount of lateral and subjacent support from A's land as is necessary for the safety of the house.

(*l*) Under the Land Acquisition Act, 1870, a Railway Company compulsorily acquires a portion of B's land for the purpose of making a siding. The Company is entitled to such amount of lateral support from B's adjoining land as is essential for the safety of the siding.

(*m*) Owing to the partition of joint property, A becomes the owner of an upper room in a building, and B becomes the owner of the portion of the building immediately beneath it. A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.

(*n*) A lets a house and grounds to B for a particular business. B has no access to them other than by crossing A's land. B is entitled to a right of way over that land suitable to the business to be carried on by B in the house and grounds.

(Notes).

Scope of Section.

(1) **This rule applicable to places where the Act is not in force.**

The same rule as regards easements created on a partition of joint property is applicable to places where the Act is not in force. 14 B. 452. **Q**

(2) **English Law applicable where this Act is not in force.**

Where this Act is not in force, a vendor, selling a land adjoining a house, will be bound by the English rule, which is also in consonance with equity and good conscience; and there will be no implied reservation of a right to light and air in his favour, unless expressly reserved. 18 B. 616. **R**

1.—"The easements..in..cls. (a), (c) & (e) are called easements of necessity."

(1) **Easements of necessity, what are.**

Where property is conveyed, which is so situate relatively to that from which it has been severed that it cannot be enjoyed without a particular privilege in or over the land of the grantor, the privilege is what is called an easement of necessity, and the grant of it is implied and passes over without any express words. 2 M. 46. **S**

(2) **Easements of necessity before the passing of the Act.**

In a case decided, before the passing of this Act, the same principle as is expressed in this section was laid down in regard to easements of necessity and apparent and continuous easements. 8 C. 956. **T**

1.—"The easements....in..cls. (a), (c) and (e) are called easements of necessity."—(Concluded).

(3) **An easement of necessity can be claimed only when there is absolute necessity for it.**

(a) A man cannot acquire a way of necessity, if he has any other means of access to his land, however inconvenient it may be, than by passing over his neighbour's soil. 17 B. 797. **U**

(b) An easement of way, claimed as a way of necessity, can only be created where there is an absolute necessity for it, and not when there is a possibility of finding out another way, though at greater expense. 15 A. 270. **V**

(c) A person will not be entitled, on a partition of property, to a right of way of necessity over the property of the co-sharer, when there is a means of access to his land without going over the co-sharer's land. 15 M.L.J. 255=28 M. 495. **W**

(d) Convenience is not the test of an easement of necessity. The law in India in this respect is the same as in England. 15 M.L.J. 255=28 M. 495. **X**

(e) A purchaser of a plot of land, adjoining his own land and having access to it from his own land, cannot acquire a way of necessity over the vendor's land. The question will not be affected by the fact that, if a stranger had bought the land, he could have acquired a way of necessity. 19 B. 797. **Y**

(f) Where, by a partition, a portion of land which was in the joint possession of the plaintiff and the defendant becomes the sole property of the defendant, the plaintiff's rights of ownership cease, and among them his right to pass and repass along an old path in defendant's share. 10 W.R. 298. **Z**

(4) **English law same as Indian.**

English cases, on ways of necessity, lay down that a man cannot acquire a way of necessity, if he has any other means of access to his land, however inconvenient it may be, than by passing over his neighbour's soil. 19 B. 797. **A**

(5) **Absolute and qualified necessity.**

The necessity contemplated in paras. *a*, *c*, *d*, of the section is an absolute necessity; whereas, that in para. (*b*) of the section, is a qualified necessity. The distinction between these two is obvious: thus a right of way may not be absolutely necessary, and yet necessary for the purpose of enjoying the property, as it was enjoyed when a transfer of it took place. The existence of this last necessity has to be determined by reference to the prior user. 3 Bom. L.R. 601. **B**

2.—"the transferee....shall be entitled."

(1) **Reason of the rule.**

The reason for the rule as to easements going with the property is that the disposition of the property by the owner is supposed to have been made with reference to the best way of enjoying it, and the best way of selling the property and realising the full value of it is to sell it with such rights as the owner thought should be attached to particular parts of it. 22 W.R. 252. **C**

2.—"the transferee....shall be entitled."—(Continued).

(2) **Severance of tenement, when confers right of way.**

On a severance of a tenement, a person will be entitled to a right of way, only, if it is expressly granted or if it is an easement of necessity. 44 P.R. 1867. D

(3) **Alienation of a portion of land carries with it its easements.**

Where a person grants a portion of his land, reserving a portion to himself, he grants with it all the easements and quasi-easements, which had been formerly used, over the part reserved, by the part granted, and which were necessary thereto. 14 B. 389. E

(4) **Grant of easements implied on a severance of tenement.**

(*a*) On the grant, by an owner of a tenement, of a part of it, as it is then used and enjoyed, the grantee of the part will acquire all those easements necessary to the reasonable enjoyment of the tenement granted. 60 P.R. 1888. F

(5) **Implication of grant, when extends to right of way.**

Implication of grant of an easement, upon the severance of tenement may, under certain circumstances, extend to a "way," but only where there has been some permanence in the adaptation of the tenement, from which continuity could be inferred. 26 C. 311. G

(6) **English Law on implied grant of easements**

The rule of English Law, known as the doctrine of implied grant of easements upon severance of tenements, being in accordance with justice, equity and good conscience, is applicable to this country. 26 C. 516=3 C.W.N. 409. H

(7) **Severance of tenement—Passing of continuous easements.**

(*a*) On a partition of tenement, easements that are continuous will pass both by implication of law and by the general words of the conveyance. 8 B.H.C. (O.C), 181. I

(*b*) On a severance of tenements, an easement, in its nature continuous, would pass by implication of law without any words of grant. 24 W.R. 345. J

(8) **Severance of tenement—Right of way.**

A way, which was a "made a visible path," and which was used, at the time of transfer, but which was not an easement of absolute necessity, was held not to have passed on a transfer of a portion of the tenement, on the ground that the transferee refused to produce his title deed in evidence, and that the non-production of which raised a presumption that the deed, if produced, would be unfavourable to the right claimed. 15 A. 270. K

(9) **General words in a conveyance of part of property—Right of way—English Law.**

See 15 A. 270 under S. 8, *supra*.

(10) **Severance of tenements—Claim to use of well and privy of other portion, on what depends.**

Where two houses, which were once one house, are in the possession of two different persons, a claim by one to the use of a well and privy in the other's house, as impliedly reserved on the sale of the house, will depend upon its being an easement of necessity. There will be no such easement of necessity if the claimant can build them in his own house or on some adjacent ground belonging to him. P.J. of the Bombay High Court (1886), 128. L

2.—"the transferee....shall be entitled."—(*Continued*).

(11) **Transfer of land to different persons—Right to easements as between the transferees.**

(*a*) Where, contemporaneously, an owner grants two portions of his land to each of two persons, each having notice of the grant to the other, the easements and quasi-easements are also granted. 14 B. 389. **M**

(*b*) But, where the owner of the house closed a door communicating between the two halves of his house and mortgaged them separately to two persons, one of the mortgagees could not re-open such door, and an action would lie for the closing of the door if it was re-opened. 16 A. 386=A.W.N. (1894), 129. **N**

(12) **Right of tenant who encroaches—way of necessity.**

Where a fazendari tenant encroaches upon a piece of land, which, thereby, becomes a part of the tenure, and builds a privy upon it, the tenant will be entitled to a right of way for himself and persons attending the house, as also for sweepers. 16 B. 552. **O**

(13) **Right of way of necessity for sweepers—Whether English Law applicable to India.**

In a case where the tenant was held entitled to a way of necessity over the adjoining land of his landlord, which included a right of way for sweepers, the Court doubted whether the decision in Bolton v. Bolton (11 Ch. D. 971), *viz.*, that the grantee was entitled to one way of necessity and that the grantor had the right to elect it, would be applicable to this country, having regard to the prejudices of the higher castes against being brought into proximity with persons whose occupation it is to remove the contents of privies. 16 B. 552. **P**

(14) **Withdrawal of a claim to way of necessity, effect of.**

Though a person withdrew his claim to a right of way through the eastern half of the house to the western half, and pressed only his claim to the western half, he was entitled, in execution of his decree for the western half, to the way from the eastern half which was the only means of access to his portion. P.J. of the Bombay High Court (1889), 186. **Q**

(15) **Decree for a room implies right to means of access.**

In a decree for a room for residence, a door to the room and reasonable means of access to it are implied. P.J. of the Bombay High Court (1887), 113. **R**

(16) **Severance of tenements—Right of way—*Quasi*-easements.**

A way, which is not strictly an easement of necessity, may pass as a *quasi*-easement. 8 C. 956. **S**

(17) **Extent of quasi-easements.**

Easements of light and air, which are impliedly granted on a severance of tenement, are not, according to English Law, in their extent, greater than easements acquired by prescription. 14 C. 839. **T**

(18) **Restoration of zemindari carries with it its easements of necessity.**

Where the Government purchases the mitta of a zemindari, sold for arrears of revenue, and restores it, subsequently, to the son of the late zemindar, the law will imply, in the absence of a special contract to the contrary, that the restoration carried all rights of water and other easements of necessity, which existed at the time of the restoration. 14 M.L.J. 350. **U**

2.—" the transferee ...shall be entitled."—(Concluded).

(19) **Right of inamdar to use water in a Government channel for irrigation.**

An inamdar will be entitled to irrigate only so much of the land, which was originally granted, free of separate charge, from the same source from which the land was irrigated at the time of the grant, though such source of irrigation is outside the inam village. Unless there is a contract with the Government, the inamdar cannot use such water free of charge for any additional extent of land. 26 M. 66 (68). **V**

(20) **Right of Government as melvaramdars for easement of water.**

Where, by a sale for arrears of revenue due to the Government, a certain village belonging to a zemindar was sold and the melvaram right in the village passed to the Government, the Government was entitled, by way of easement, to levy wet assessment on such lands, though the land was irrigated from a tank belonging to the zemindar and situated in another land, but they could not levy water-cess. 26 M. 51. **W**

3.—" The transferor shall be entitled."

(1) *Quasi*-**easements in vendor's favour—English Law—" A man cannot derogate from his own grant."**

(*a*) If, on the grant by an owner of a tenement of part of that tenement, as it was then used and enjoyed, the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant, according to English Law; the only exception to this rule being easements of necessity. 18 B. 616. **X**

(*b*) According to the English Law, a vendor cannot derogate from his own grant, and there is no implied reservation of quasi-easements in his favour. A vendor or his successor in title, claiming such a reservation, must show, by the conduct of the parties to the sale, that it cannot reasonably have been intended by either of them to do otherwise than reserve to the vendor the right he claims. 18 B. 616. **Y**

(2) **Sale of a portion of property—Right of a vendor to a way not absolutely necessary.**

Where a portion of a property is sold, without express reservation of a right of way not absolutely necessary, the principle that a man cannot derogate from his own grant applies and no such right is saved. 16 C.P.L.R. 156. **Z**

(3) **Land taken for public purposes—Right of way.**

Where a portion of the land, belonging to a person, had been taken for public purposes, and access to the remaining portion had been blocked thereby, he would be entitled to a right of way on the land so taken. P.J. of the Bombay High Court (1874), 118. **A**

(4) **" Appurtenant," in a grant, may include a right of way in favour of grantor.**

Acts of ownership and user of a road by a man, across land, for the enjoyment and exclusive convenience of himself, as occupier of the adjoining lands, may amount to an enjoyment as 'appurtenant,' even though such enjoyment was during the unity of possession. 15 A. 270 (289). **B**

4.—"Easement, apparent and continuous."

(1) **Apparent and continuous easement—Right of way.**

(*a*) A "way" is evidently neither a continuous nor always an apparent easement. 26 C. 311. C

(*b*) So, a right of way, not being an apparent or continuous easement, a person, on partition of a tenement, will not be entitled to a right of way under cl. (f). 15 M.L.J. 255 = 28 M. 495. D

(2) **Way as apparent and continuous easement—English Law.**

There is no English authority that has decided, that a way, without any express or general words in a conveyance, and apart from any structural peculiarities of a building indicating that, for the use of the building, a way must have been intended to pass, would pass on a severance as an apparent and continuous easement. 15 A. 270. E

(3) **Easement to discharge drainage.**

The doctrine of apparent and continuous easements applies to India. So the plaintiff was held to be entitled to the apparent and continuous easement to discharge drainage. 49 P.R. 1900. F

(4) **Non-apparent and non-continuous easements.**

Where an easement is not apparent or continuous, a claim for easement cannot be made under clause (f). 28 M. 495 = 15 M.L.J. 255. G

(5) **Grant of discontinuous easement, not being one of necessity.**

A grant of a discontinuous easement as a right of way, not being a way of necessity, cannot be implied from the disposition of the severed tenements, and will not pass by a deed of grant, without express words, showing, that it was the custom of the parties to pass it along with the property granted. 2 M. 46. H

(6) **Quasi-easements—Destination** *du pere de famille.*

The case of an apparent and continuous easement, passing on a severance of a tenement, when it is necessary for its enjoyment in the state in which it was at the time of severance, is discussed in books under the principle of disposition of the owner of two tenements. (*Destination du pere de famille*), 8 C. 958. I

5.—"where partition is made of joint property."

(1) **Severance of property—Right to light.**

On a partition of a house, the right to light for some windows in the wall of one of the partitioned portions, which overlooked the roof of the other, can only be acquired by prescription, unless it be an easement of necessity. P. J. of the Bombay High Court (1897), 471. J

(2) **Partition of tenement—Right to use a drainage.**

On partition of a tenement, a co-sharer will not be entitled to use the drainage, situate on the land of the other co-sharer, unless he has acquired a prescriptive right, or the easement is one of necessity. 4 C.P.L.R. 169. K

(3) **Right of way on severance of a tenement.**

It is doubtful, whether a description of the property sold, as bounded on one side by a passage in the possession of vendor would, of itself, carry a right of way over the passage. 7 C. 665. L

6.—" where immoveable property passes by operation of law, &c."

(1) Partition by Court, whether implies grant of easement of necessity.

In case of sale or other transfer *inter partes*, a grant of the easement of necessity and quasi-easement would be roperly implied. Whether such implication arises in case of a partition by a Court of Law was left undecided, as it was not necessary for the determination of the case to decide that point. 14 C. 797. **M**

(2) Partition decree—Ancient lights.

Where, under a partition decree, certain rooms with ancient lights were allotted to the plaintiff, the defendant has no right to block them up, and it does not make any difference that there are no mutual conveyances as between the parties. 3 C.W.N. 405. **N**

(3) Implied grant of easements on partition by a consent decree.

The doctrine of implied grant of easements, upon severance of tenements, is applicable to the case of a partition of property, which has been effected by consent of the parties to a suit, and not by the Court as in a contested suit, the Court merely recording the consent. 26 C. 516= 3 C.W.N. 409. **O**

(4) Partition of property by award of arbitrators—Easement.

Where a Court partitioned a house and lands belonging to a joint Hindu family, according to an award made by an arbitrator, one of the sharers could not claim, in a suit, a right of way from the family-house to the public road, through the lands allotted to another member, such right of way not being granted by the award, and not being an easement of necessity. 5 C.L.R. 338. **P**

(5) Partition—Implication of easement—English Law—Act IX of 1871.

Act IX of 1871 does not exclude other modes, than those provided therein, of acquiring an easement by an enjoyment. Therefore, in case of partition of joint property, a grant of easement, on principles of English Law, might be implied independently of user. 15 B.L.R. 361. **Q**

Direction of way of necessity.

14. When a right to a way of necessity is created under section 13, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way[1]; but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

(Notes).

1.—" the transferor...is entitled to set out the way."

(1) Right of way for sweepers—English and Indian Law.

In a case where the tenant was held entitled to a way of necessity over the adjoining land of his landlord, which included a right of way for sweepers, the Court doubted whether the decision in Bolton v. Bolton (11 Ch.D. 971), *viz.*, that the grantee was entitled to a way of necessity, and that the grantor had the right to elect it, would be applicable to this country, having regard to the prejudice of the higher castes against being brought into proximity with sweepers. 16 B. 552. **R**

Acquisition by prescription (14).

15. Where the access and use of light or air to and for any building (1) has been peaceably enjoyed (2) therewith, as an easement (3) without interruption (4), and for twenty years,

and where support from one person's land, or things affixed thereto (5), has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way (6) or any other easement (7) has been peaceably and openly enjoyed (8) by any person claiming title thereto, as an easement (3), and as of right (9), without interruption (4), and for twenty years,

the right to such access and use of light or air, support, or other easement, shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit (10) wherein the claim to which such period relates is contested.

Explanation I.—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement (11) with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II.—Nothing is an interruption (12) within the meaning of this section, unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof, and of the person making or authorizing the same to be made.

Explanation III.—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV.—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to Government (13), this section shall be read as if, for the words "twenty years," the words "sixty years" were substituted.

Illustrations.

(*a*) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto, as an easement and as of right, without interruption, from 1st January, 1862 to 1st January, 1882. The plaintiff is entitled to judgment.

(*b*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that, for a year of that time, the plaintiff was entitled to possession of the servient heritage as lessee thereof, and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed "as an easement" for twenty years.

(*c*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion, during the twenty years, had admitted that the user was not of right, and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed "as of right" for twenty years.

(Notes).

1.—"access and use of light and air to and for any building."

(1) **Easement of light, in what consists.**

An easement of light appears to consist in the right of the owner of the dominant tenement to prevent the owner of the servient tenement from obstructing the passage of certain definite rays or pencils of light. 26 B. 374=4 Bom. L.R. 34. **S**

(2) **Right to air, in what consists.**

The Easements Act creates no right to the uninterrupted flow of the south breeze. Under it, a right to air is a right to the quantity of air which enters a particular opening. It is, in other words, a right to the volume of air coming through the opening, apart from its being from south or from any other direction. 7 Bom. L.R. 352. **T**

(3) **Prescriptive right to light and air, how acquired.**

A right to light and air, which is in the nature of a prescriptive easement, can only arise after 20 years' enjoyment. 2 Bom. L.R. 454. **U**

(4) **Easement of light and air—When does it begin.**

The enjoyment of light and air begins from the time, when the building, in respect of which the right is claimed, assumes the appearance and aspect of an outward dwelling-house. though not used or completed as a dwelling-house. 1 B.H.C. (O.C.), 148. **V**

(5) **Right to light and air—English and Indian Law.**

In dealing with right to air, English decisions are not of much avail, because, the conditions of this country are different from those of England. In England more light is needed than here; whereas more air is needed here than in England. 7 Bom. L.R. 352. **W**

(6) **Completion of title to easement of light and air.**

Where, within the completion of the twenty years' user by the plaintiff, the defendants gave to the plaintiff notice of their intention to build and did, as a matter of fact, begin their buildings, held the plaintiff had not completed his prescriptive title to an easement of light and air, though the defendant's building reached such a height as to obstruct plaintiff's light after the lapse of twenty years. 12 B.L.R. 406=Sup. Vol. I.A. 175 (**P.C.**). **X**

1.—"access and use of light and air to and for any building."—(Concluded).

(7) Right to light and air, nature of—Right can be to vertical, not lateral, light.

Every owner of land has a natural right to so much light and air as pass vertically thereto; such right does not extend to light and air coming laterally over the land of another. In India, this right must be acquired by prescription in the manner provided by S. 15 of the Easements Act, which, following the English Law, declares such easements to be absolute. 3 N.L.R. 114. Y

2.—"has been....enjoyed."

(1) Enjoyment does not necessarily mean actual user.

The enjoyment, intended by this section, means something different from actual user. For, in the case of a discontinuous easement, there may be days and weeks and months during which the right may not be exercised at all; and yet, during all these days and weeks and months, the person claiming the right may be in full enjoyment of the right. 7 C. 132. Z

(2) Non-user for a long time—proof of enjoyment up till the end of statutory period.

Even if it is conceded that the plaintiffs need not prove an actual user of a right up till the end of the statutory period, there must, where there is no user for a long time, be circumstances from which the Court can infer the continuance of an enjoyment, as of right, over the whole statutory period, and the cessation of user must be at least consistent with such continuance. 3 C.W.N. 610=26 C. 593. A

(3) Enjoyment cannot at the same time be in abeyance, and yet continue.

The enjoyment referred to, in this section, cannot be in abeyance and at the same time continue, so as to give the plaintiff the special right claimed. 26 C. 593=3 C.W.N. 610. B

(4) Continued enjoyment—Question of fact.

The question of continued enjoyment is a question of fact. It is an inference to be drawn from facts. 26 C. 593=3 C.W.N. 610. C

(5) Enjoyment must not be under a license.

When a house was occupied by a family, closely related to that of the defendant, the members of both the families were accustomed to go over a path. This would not entitle a person, who had bought the house, to claim such right. The use of the way by the original owner was merely a license. 14 W.R. 79. D

(6) What constitutes a continuance of enjoyment.

No rule can be laid down as to what will or will not constitute a continuance of the enjoyment, as of right, when there was no exercise of it for any given period. That must depend upon the circumstances of each case and the nature of the right claimed. 26 C. 593=3 C.W.N. 610. E

(7) Trespass on the land on which an easement is claimed, effect of.

Where a person, claiming a right of easement over a site, trespasses on such site, he cannot claim a right of easement of way, because, such seizing of the two tenements by the same person has the effect of extinguishing the easement. But, if the trespass was of a short duration, and the subsequent enjoyment of the easement is for a long time, the lengthened enjoyment of the right may give rise to the presumption of a grant or agreement between the two owners. 2 A.W.N. 76. F

3.—"As an easement."

(1) **"As an easement," defined—Right of way.**

The person, claiming the right, must claim it as an easement, that is, as a right which he, as owner or occupier of certain land, possesses for the beneficial enjoyment of that land to pass over another person's land. 2 C.P.L.R. 34. G

(2) **The enjoyment must be as an easement.**

In order to acquire an easement under this section, the enjoyment must have been by a person claiming title thereto, as an easement, and as of right, for 20 years. 16 B. 592. H

(3) **Enjoyment under a license.**

An—cannot confer an easement. 14 W.R. 79. I

(4) **Thus evidence in support of ownership cannot establish easement.**

Evidence of immemorial user, adduced in support of a right founded in ownership, does not, when that right is negatived, tend to establish an easement. 16 B. 592. J

(5) **Rights of ownership and easement are incompatible.**

(*a*) A right of ownership and a right of easement are incompatible. If a person claim a site as owner, he cannot claim a right of way over the same, as an easement. 3 A.W.N. 66. K

(*b*) A right of ownership and a right by prescription are wholly inconsistent. 16 W.R. 198. L

(*c*) A plaintiff, who, in his previous suit, claimed a right of possession and failed to prove it, cannot claim an easement over the same land in a subsequent suit, whether it is based on S. 26 of the Limitation Act or on immemorial user. 16 B. 592. M

(*d*) Where a plaintiff asks for the establishment of two rights, firstly his proprietary right, and, secondly a prescriptive right, and it appears that he is entitled to only one of them, the other must, in some way, be relinquished. 16 W.R. 198. N

(6) **But the fact that plaint contains inconsistent claims cannot justify dismissal of suit.**

The fact that a plaint contains allegations inconsistent with one another will not justify the dismissal of the suit. 18 A. 125. O

(7) **A party must be limited to the case he puts forward in his plaint.**

(*a*) A party must be limited to the case which he puts forward in his plaint. He may, indeed, at the commencement of the suit, put forward in his plaint, an alternative case; thus the defendant will have notice that he has more than one case to meet, and will not be taken by surprise. 9 B.H.C. 1 (**F.B.**) P

(*b*) The Court should give such relief as is claimed in the plaint. Although the Court is bound to take into consideration all the rights of the parties to the suit, whether legal or equitable, and by its decree to give effect to those rights as far as possible, the Court should confine itself to granting such relief as is prayed in the plaint. 1 M.H.C. 471. Q

(*c*) In a suit brought to establish a right of ownership over a lane, it is not competent to the Court to enter into, and decide, the question of right to an easement over the lane. 2 M.L.J. 257. See also 2 B.H.C. 176. R

3.—"As an easement."—(Concluded).

(8) **Alternative claims may be allowed.**

(*a*) A suit is not liable to be dismissed because the plaintiff claims in the alternative, over the same plot of ground, rights of ownership and easement. 4 C.L.J. 437=11 C.W.N. 20=34 C. 51=1 M.L.T. 364 (F.B.). S

(*b*) The plaintiff was allowed to sue for a mandatory injunction, to compel the removal of a verandah, on the ground, that the soil of the lane on which the verandah was built belonged to him, or in the alternative, that he had a right of footway over the lane. 1 C.L.R. 425. T

(*c*) In a suit to recover possession of land and to close a road, the defendant may either prove that the land is his own or there is a road over it. It is enough if he proves one or other of the defences. 20 W.R. 94. U

(9) **Where plaintiff's claim to possession is proved, Court need not consider his right to easement.**

Where plaintiff's claim to possession of land is clearly established, it is not necessary to consider the plaintiff's claim, as an easement. 5 C.P.L.R. 53. V

(10) **Distinct ownership of dominant and servient tenements, necessary for easement.**

(*a*) The strict definition of easements requires the existence of two separate tenements in the ownership of two distinct persons. 2 M. 46. W

(*b*) A man cannot subject one part of his property to another by an easement. 24 W.R. 345. X

(*c*) Prescriptive acquisition of easement is not possible, not only in cases where there is unity of title but also where there is unity of possession of the two tenements. 15 B.L.R. 361. Y

(*d*) No easement connected with, or appurtenant to, the common property of two persons can be acquired by the one over the other. 3 N.L.R. 114. Z

(11) **Trespass on land on which easement is claimed, effect of.**

See 2 A.W.N. 76, under the heading "**Has been....enjoyed**" (2), *supra*.

4.—"without interruption."

(1) **Interruption—Meaning of.**

The word "interruption," means an obstruction or prevention of the user of the easement by some person acting adversely to the person who claims it. 1 C. 422=25 W.R. 228. A

(2) **Interruption, meaning of.**

Interruption in this section does not apply to the obstruction and cessation of enjoyment, which may have lasted until the institution of the suit, but only to a period of cessation of enjoyment followed by a further period of enjoyment. 73 P.R. 1905=203 P.L.R. 1905. B

(3) **Interrupted user for years will not confer easement.**

The mere fact of user for any number of years will not confer a right of way, if the user be, from time to time, interrupted by the owner. 13 W.R. 449. C

4.—" without interruption."—(Continued).

(4) **But where an easement is in its nature discontinuous, non-continuous user may suffice.**

(*a*) Where a person claims a right of way for boats, which can only be used during two or three months, when the defendant's lands are flooded, and if there was a lack of rain, it is probable that even for 20 or 21 months the right may not be exercised at all; yet so long as the plaintiff's right was not interfered with, whenever he had occasion to use it, his enjoyment must be considered as continuing all the year round. 7 C. 132. D

(*b*) Mere non-user for a time, of an easement which the owner might, if he pleased, enjoy during every hour of that time, but which, for some good reason, he did not care to enjoy, would not amount to a discontinuance of user. 1 C. 422 (430) = 25 W.R. 228. E

(*c*) An easement, to cause the water of a river to flow, by means of bunds erected on the claimant's land, across the servient tenement, on to the dominant tenement in the east, may be established by 20 years' user during the periods of drought, when it could be taken advantage of, although the exercise of the right may not be continuous. 30 C. 1077. F

(5) **Temporary interruption, effect of.**

A temporary interruption of a right of way, such as during the rainy season, when the land was flooded and the way could not be used, cannot affect a right of user. 22 W.R. 340. G

(6) **Wrongful interruption, effect of.**

(*a*) A wrongful interruption of a right of user of a channel, to permit the egress of water, which may collect during the rain on the surface of the plaintiff's land, will not destroy the plaintiff's right of user. 7 W.R. 367. H

(*b*) If an interruption to an easement has been a wrongful one, the plaintiff's right of user cannot be destroyed if steps are immediately taken to assert the right; failure to do it for a long time may lead to a presumption of acquiescence. 15 W.R. 401. I

(7) **Actual knowledge of the servient owner—English Law before Prescription Act.**

By the English Law, before the Prescription Act, in the case of a claim to the access and use of light for a building, the plaintiff, in order to establish his title, would have to show an uninterrupted user of at least twenty years, with the acquiescence of the servient owner. 12 B.L.R. 406 = Sup. Vol. I.A. 175 (P.C.). J

(8) **Reason of the rule in English Law.**

According to English Law, prescription implies a grant; the user by which a prescriptive right is gained is only evidence of a previous grant; and, therefore, in order that such user may confer an easement, it follows that the owner of the servient tenement must have known that such an easement was being enjoyed, and also have been in a position to interfere with and obstruct its exercise, had he been so disposed. 10 C. 214 (217). K

4.—"without interruption."—(Concluded).

(9) **So, also, the period of incapacity of the servient owner is excluded.**

So, the English Prescription Act excludes the time during which an infant, an insane person, or a married woman is the owner of the servient tenement, from the period, during which a prescriptive right is in course of acquisition. 10 C. 214. L

(10) **But this rule of English Law not applicable to India.**

But the principle does not apply to the acquisition of easement under the Limitation Act, 1877. Ignorance of the servient owner, though a bar according to English Law, is not so according to the Limitation Act. 10 C. 214. M

(11) **Knowledge of the servient owner not necessary under Act XV of 1877.**

In a case decided under Act XV of 1877 (S. 26), the Calcutta High Court held that for the purpose of acquiring an easement, such as a right of way, it was not necessary that the servient owner ought to have had knowledge of the enjoyment of the easement. 10 C. 214. N

(12) **Notice by servient owner to obstruct before 20 years and actual obstruction after, effect of.**

According to English Law, prevailing before the passing of the Prescription Act, the plaintiff, in order to establish title to an easement, would have to show an uninterrupted user of at least 20 years, with the acquiescence of the owner of the servient tenement. But where the servient owner, before the expiration of these 20 years, not merely gives notice of his intention to interfere with the enjoyment, and to raise an obstruction, but actually commences the erection of the obstruction, though it is completed only a few days after the expiration of 20 years, the acquiescence of the servient owner cannot be presumed. 19 W.R. 194. O

(13) **Interruption—Proof—Petition to Criminal Court, no evidence.**

When the date of interruption of an easement has to be proved for the purposes of S. 26 of the Limitation Act, 1877, the mention thereof in a petition presented to a criminal Court cannot be used in evidence. 6 C.W.N. 31. P

5.—"support from one person's land..attached thereto."

(1) **Right to roots and overhanging branches cannot be acquired by prescription.**

The owner of a tree has no right to prevent a person, lawfully in possession of land, into or over which its roots or branches have groven from cutting away so much of them as projects into or over the latter's land, and the owner of the tree is not entitled to notice, unless his land is entered in order to effect such cutting. Such a right cannot be acquired by prescription. 19 B. 420. Q

(2) **Right of owner to chop off overhanging branches.**

The person, over whose property the branches of the neighbour's tree overhang, has the right to cut those branches, and may obtain an injunction restraining the defendant from obstructing him in so doing. 24 A. 499. R

(3) **He may also chop off penetrating roots.**

(*a*) No prescriptive right can be acquired to compel a man, to submit to the penetration of his lands by the roots of a tree planted on his neighbour's soil, and a man may consequently abate any such encroachment upon his property by cutting the roots in the same manner that he may remove the overhanging branches. 31 C. 944. S

5.—"support from one person's land..attached thereto."—(Concluded).

(*o*) Every owner is under an obligation not to allow the boughs of his tree to grow so as to overhang, or the roots of his tree to extend so as to penetrate, his neighbour's land, to the detriment of the latter; in case of a breach of such an obligation, it is open to the Court to grant a mandatory injunction for the removal of the nuisance. *Ibid.* **T**

(4) **And no notice necessary if he does not trespass on the other's land.**

The owner of a land which is overhung by trees, may, without notice, if he does not trespass on his neighbour's land, cut the branches so far as they overhang, and however long previously they have overhung his land. *Ibid.* **U**

6.—"right of way."

(1) **Rights of way, different kinds of.**

By the Common Law of England, there are three distinct classes of right of way, which exist also in India. First, there are private rights having their origin in grant or prescription; secondly, there are rights belonging to certain classes of persons, certain portion of public. Such rights commonly have their origin in custom; thirdly, there are public rights, in the full sense of the term, which exist for the benefit of all the subjects of the state; and the source of these is, ordinarily, dedication. 15 C. 460 (**F.B**). **V**

(2) **Modes of acquiring a right of way—by grant, prescription or necessity.**

(*a*) A right of way over another man's land is an easement which arises either by grant or by prescription or from necessity. 4 W.R. 49. **W**

(*b*) A right of way may be acquired not only by grant but also by prescription. 16 W.R. 284. **X**

(*c*) A right of way, as consists in passing over the land of another, at particular seasons of the year, may be acquired by prescription. 10 W.R. 363. **Y**

(*d*) A right of way may be created either by grant or by immemorial custom or by necessity; and a party seeking to establish such right ought to prove the existence thereof and its uninterrupted enjoyment. 14 W.R. 199. **Z**

(3) **How a right of way by prescription is acquired.**

(*a*) To acquire a right of way by user, there must be a peaceable and open enjoyment, by the person claiming title thereto, as an easement, and as of right, without interruption, and for 20 years. 2 C.P.L.R. 34. **A**

(*b*) To make a right of user absolute, the claimant ought to prove twenty years of peaceable and open enjoyment, without interruption, in cases of right of way. 20 W.R. 283. **B**

(4) **Right of way may be established over waste land.**

A right of user over a pathway may be established notwithstanding that the path runs over waste land. 22 W.R. 340. **C**

(5) **Right of way for boats.**

A prescriptive right to pass and repass boats during the rainy season, over certain lands, belonging to the defendants, may be acquired notwithstanding that the general public has no such right, and that the channel does not lead to plaintiff's house, and that having the channel open is injurious to a tank belonging to the plaintiff. 1 W.R. 217. **D**

6.—"right of way."—(Concluded).

(6) **Right of way—Mortgagee is not estopped by a decision against mortgagor in possession.**

A mortgagee, not in possession, is not estopped by a decision, affirming a right of way, in a suit between the mortgagor and a third party, from suing to declare that there is no such right of way, he having no knowledge of the suit, and the suit having been decided without any collusion between the parties to it. 4 C. 692. E

(7) **Rights of public to pass over public road not easement.**

The right of the public, to pass over a public road, is not in the nature of an easement, properly so called, nor can it be acquired by prescription. 62 P.R. 1898. F

(8) **But if exercised by owners of adjacent lands, they are in the nature of easement.**

The bank of a river may be, and constantly is, private property. There may be public rights of passage over the banks for the purpose of navigation. These are rights in the nature of easements to be exercised over the property of the persons, who own the lands of the bank. 22 W.R. 276. G

(9) **Public road—what amounts to sufficient proof of it.**

In order to establish that a road is a public road, it is enough to show that acts of user, by the public, of such character as to warrant the inference that the owner intended to make over to the public the right to use the land as a public highway, were acquiesced in by the owner. 6 C.L.R. 282. H

(10) **User of a road by the public for a long time, presumption from.**

The user of a road by the public for a sufficiently long time though less than 20 years, is, apart from this section, sufficient to raise a presumption of the owner's dedication to the public. The presumption, however, can be rebutted by evidence of intention on the owner's part that the public should only have a permissive use. 62 P.R. 1898. I

(11) **Obstruction to a right of way—Magistrate's jurisdiction.**

In a case concerning a right of way a Magistrate must retain a person in the use of the way, if he has been using and occupying it, referring the owner of the land to determine the question of right to the easement in the Civil Court. The fact that there is another right of way is out of question. 2 W.R. (Cr.), 64. J

(12) **Public way—Magistrate's jurisdiction.**

See S. 35, *infra*.

7.—"Any other easement."

(A)—OF PROFITS *A PRENDRÉ*.

(B)—OF PASTURAGE.

(C)—OF FISHERY.

(D)—OF FERRY.

(E)—OF WATER.

&c., &c., &c.

7.—"any other easement."—(Continued).

(A)—OF PROFITS *A PRENDRE*.

(1) "Any other easement" includes profits *a prendré* under S. 26 of Act XV of 1877.

The words "any other easement" in S. 26, Act XV of 1877 include profits *a prendré*. 8 C.W.N. 425 (P.C.)=31 C. 503. K

(2) English Law—Acquisition of profits *a prendré* by village inhabitants, by custom or prescription.

The rule of English Law is that a claim to a profit *a prendré* cannot be acquired by the inhabitants of a village, either by custom or by prescription, unless a grant can be presumed incorporating the inhabitants for that purpose. This rule does not apply to a right of free pasturage, which has always been recognised by Government as a right belonging to certain villages and must have been acquired by custom or prescription. 14 B. 213. L

(3) Reason of the rule of English Law.

The main reason for the English rule, that the inhabitants of a village cannot acquire a profit *a prendré* either by custom or prescription, is the fluctuating character of the claimants, which, from the possible increase of the number of claimants, might practically operate to divest the owner of all the profits of his property. 14 B. 213. M

(4) But rights of fluctuating bodies to own property has been reorganised in India.

The law of this country recognises fluctuating communities as legal personæ, capable of owning property as, for instance, the caste, and the village, etc. 28 B. 276. See, also, 28 B. 20. N

(B)—OF PASTURAGE.

(1) Right of free pasturage—Nature and extent of the right.

(*a*) In the absence of special circumstances, the recognised custom of the country, under which the right to free pasturage over Government waste land is enjoyed, does not confer the right of pasturage on any particular piece of land. 14 B. 213. O

(*b*) The fact that a person is entitled to graze his cattle on a tank-bed as a raiyat of the village, the other raiyats of the village having similar rights, does not make his right a public right, in the sense that no action can be brought upon it unless special damage is proved. 11 M. 42. P

(2) Right of free pasture over Government lands—Bombay Land Revenue Code, 1879.

The Courts have jurisdiction, under Bombay Land Revenue Code, 1879, to declare that the villagers of a specified village are entitled to rights of free pasturage over Government waste lands within the limits of their village. The villagers cannot go further and enjoin the Collector to pursue any particular course in connection with them, while, at all events, he is acting *bona fide* in pursuance of the power which the provisions of the statute confer upon him. 21 B. 684. Q

(3) Extent of tenant's rights of free pasturage—Landlord and tenant.

The landlord, over whose waste land the tenants have a right of free pasturage, may constitute or execute improvements on such lands, so long as sufficient pasturage is left to the raiyats and other persons entitled to the right of pasturage. 8 C.W.N. 425 (P. C.)=31 C. 503. R

7.—"any other easement."—(Continued).

(C) & (D)—OF FISHERY AND FERRY.

(1) **Right of fishery can be acquired as easement under Act XV of 1877.**

A prescriptive right of fishery can be claimed and acquired as an easement, under the Limitation Act of 1877, although the claimant was not in possession of any dominant heritage. 5 C. 945=6 C.L.R. 269. **S**

(2) **But under the Limitation Act, 1871, such a right was held not an easement.**

Under S. 27, Limitation Act of 1871 a right of fishery was held not to be an easement. 3 C. 276=1 C.L.R. 592. **T**

(3) **Right of fishery is recognised as property in this country.**

Fishery is a right which is recognised as property in this country. 15 C. 388 (399). **U**

(4) **A common of fishery is immoveable property.**

(*a*) A common of fishery, being private right of fishery, would come under the denomination of immoveable property in general, and would also be so under the provisions of S. 9 of the Specific Relief Act. 12 B. 221 (224). See, *contra*, 19 C. 544 (**F.B.**). **V**

(*b*) Jalkar rights are often settled as separate estates; they are sometimes liable to be sold, and are habitually treated as immoveable property as fully as any property can be. 19 C. 544 (560) (**F.B.**). **W**

(5) **But right of fishery is not immoveable property under S. 145, Crim. Pro. Code.**

A right of jalkar is not tangible immoveable property, within the meaning of S. 145 of the Crim. Pro. Code. 13 C. 179. **X**

(6) **Grant of jalkar rights.**

It is quite familiar that jalkar rights are frequently granted extending over large estates—the property of other persons than the grantor of the jalkar. 24 W.R. 200 (201). **Y**

(7) **'Jalkar,' what is—whether an easement.**

A *jalkar* is the right to take the profits of a river, lake or other water on a particular estate or tract of country and is an interest in immoveable property within the meaning of Art. 145 of the Limitation Act; it is not an easement within the meaning of S. 27 of the Limitation Act of 1877. 3 C. 276=1 C.L.R. 592. See next Case. **Z**

(8) **'Jalkar' rights may be acquired as easement.**

But a prescriptive right of fishery, which is a profit *a prendre* in gross, is an easement under S. 3 of Act XV of 1877, and may be acquired by an enjoyment of it, as of right, without interruption, and for 20 years, although the plaintiff does not prove that he was in enjoyment of any dominant tenement. 5 C. 945=6 C.L.R. 269. **A**

(9) **Jalkar—Its significance.**

The term *jalkar* is a general one signifying "water rights," and might, therefore, aptly include the right to drift and stranded timber, as well as the right of fishing, or any other interest of similar kind in the produce of water. 24 C. 504 (**P.C.**). **B**

7.—"any other easement."—(Continued).

(C) & (D)—OF FISHERY AND FERRY.—(*Continued*).

(10) **Private right of ferry.**

There are proprietory rights in a private ferry of such a nature that another party may not so interfere with the profits arising therefrom, by running a boat, if not exactly in the same line, at least within such a distance as, for all practical purposes, would be the same as if it were on the same line. 16 W.R. 281. **C**

(11) **Right of ferry will not arise merely by a man owning both banks of a river.**

The mere fact of a person owning both banks of a river will not give him the right of ferry. 2 W.R. 286. **D**

(12) **Exclusive right of ferry, how acquired.**

A right of ferry may be acquired as against his neighbour, by proving a grant from him or his predecessors in title, granting the right of embarking and disembarking passengers on his land, or it may be acquired, as against all the world, by proof of long uninterrupted user. 6 C. 608 = 7 C.L.R. 504. **E**

(13) **Right to set up ferry over another's property.**

See 19 C. 253 (**P.C.**) under S. 7, *supra*.

(14) **Right of jalkar does not involve property in the soil.**

The right of jalkar does not involve any actual property in the soil over which the water flows. 24 W.R. 200. **F**

15) **Jalkar is not interest in land under Bengal Act X of 1871.**

Jalkar does not import any interest in the soil itself, and it is not an interest in land, within the meaning of the definition in District Roads Cess Act; land being there defined to mean land, which is cultivated or uncultivated or covered with water. 9 C. 183. **G**

(16) **Jalkar—Ordinary application of it to inland waters not to the seas.**

The term jalkar is usually applied to inland waters, such as *jheels* or *bheels* or small streams and not to arms of sea. 11 C. 434 (**F.B.**). **H**

(17) **Rights of fluctuating bodies as village inhabitants to acquire prescriptive right of fishery.**

The inhabitants of a village, which is a fluctuating and indefinite body, cannot acquire a prescriptive right to fish in certain *bhils* belonging to a private owner, and a custom to that effect is not valid on account of its unreasonableness. 9 C. 698. **I**

(18) **Acquisition of profits *a prendre* by village inhabitants—English Law.**

See 14 B. 213, under Heading, 7, No. 2, '**Any other Easement**," *supra*.

(19) **Rights of fluctuating bodies to own property recognised in India.**

See 28 B. 276 under Heading, 7, No. 1, *supra*.

(20) **Right of fishery in sea is vested in crown and is not subject of property.**

The right of the public to fish in the sea, whether it and its subjacent soil be or be not vested in the crown, is common, and is not the subject of property. 2 B. 19. **J**

7.—" any other easement".—(Continued).

(C) & (D)—OF FISHERY AND FERRY.—(*Continued*).

(21) **Beds of tidal and navigable rivers are also vested in the crown.**

(*a*) The beds of tidal rivers in British India are, like those of rivers of Great Britain, to be *prima facie* regarded as vested in the crown. 4 C. 53. K

(*b*) The Government has a free-hold in the bed of navigable rivers and to the land between high and low water mark. 6 M.I.A. 267. L

(22) **No distinction in India between tidal rivers and navigable rivers which had ceased to be tidal.**

In India, there is no distinction between a tidal river, and a navigable river which has ceased to be tidal as regards the proprietorship of the bed of the river. 18 W.R. 113 (119) (**P.C.**). M

(23) **Rights of fishery in such rivers are open to the public—No exclusive right in riparian owners.**

The bed of a navigable river, where the tide flows and ebbs, must be *prima facie* regarded as vested in the state, and the fishery in it as open to the public; the riparian proprietors as lords of the soil of the river are not entitled to any exclusive or special right of fishing in it. Cal. S.D.A. Reports (1859), 1357. N

(24) **But exclusive fishery rights in such rivers can be granted by the crown.**

(*a*) The crown can grant the exclusive rights of fishery in tidal navigable rivers to private individuals. 11 C. 434 (**F.B**). O

(*b*) The Government is not prohibited by law from granting to individuals the exclusive right of fishing in a navigable river. 15 W.R. 212. P

(*c*) The bed of a tidal and navigable river is vested in the crown; and the right of *jalkar* (fishery) in such river, as also the bed of the river itself may be granted by Government (whether it be in the exercise of their prerogative as the crown, or as representing the public) to private individuals, to be held by them as private property, subject, of course, to the right of navigation and such other rights which the public has in such rivers. 22 C. 352. Q

(*d*) Jalkar rights in navigable rivers are often granted, to private persons, by Government for the purposes of revenue and also sold for arrears of revenue. 11 C.L.R. 9. R

(*e*) The exclusive right of fishery in tidal rivers may be ordinarily obtained by grant from the crown or by prescription. 11 C. 434 (**F.B**). S

(*f*) The right of public to fish in the sea and in all bays, branches and arms of the sea, and in all navigable and tidal rivers, may be restrained or regulated by legislature; and it may be curtailed by an exclusive privilege acquired either by grant or prescription by certain persons within certain limits. 8 M. 467. T

(25) **Such grant of fishery should be express in terms.**

Grant of fishery in tidal navigable rivers should be express in its terms, and the mere grant of jalkar would not ordinarily be sufficient. 11 C. 434 (**F.B.**) U

(26) **Period of prescription necessary when easement is an infringement of public rights.**

An exclusive right of fishing in sea and in tidal and navigable rivers, being an infringement on the general rights of the public, could be acquired by prescription after a period of enjoyment which would suffice for the acquisition of easement against the crown. 8 M. 467. V

7.—"any other easement."—(Continued).

(C) & (D)—OF FISHERY AND FERRY.—(*Concluded*).

(27) **Difference between a public and private river.**

At common law, all rivers above the flow and reflow of the tide are *prima facie* deemed to be private. A public river is one which is intended for the use of the public, that is to say, subjected by law to a kind of servitude in favour of all the members of the state. 22 B. 988 (993). **W**

(28) **Several fishery.**

In a several fishery, a person has the exclusive right of fishing in water, covering land, which does not belong to himself. 2 B. 19. **X**

(29) **Common of fishery.**

In a common of fishery, all persons of a certain class, as all the tenants of a manor, or the dwellers of a parish, have equal right of fishing in the same water. 2 B. 19. **Y**

(30) **Free fishery.**

In a free fishery several specified persons have the equal right of fishing in the same water. 2 B. 19. **Z**

(31) **Territorial fishery.**

When the ownership of the soil and the right of fishery are associated in the same person, such right of fishery is called territorial fishery. 2 B. 19. **A**

(32) **Common fishery.**

In a common fishery all the subjects of the realm have equal rights as in the case in the sea or tidal navigable rivers. 2 B. 19. **B**

(E)—OF WATER.

(1) **Water-course, meaning of.**

The term water-course denotes, in law, water as it flows in the channel, and any right of easement in connection therewith. P.R. (1896), 71. **C**

(2) **Rights in respect of water in this country—Prescription.**

No presumption of law in regard to rights in respect of water are known in this country. But the proof of ancient reasonable user, by particular recognised means, is sufficient to give the right. W.R. (1864), 367. **D**

(3) **Prescriptive right to use water.**

Where plaintiffs were, from time immemorial, irrigating their field by using the water of a tank, which had two openings, through one of which water flowed in and through another the water flowed out, into two channels, a presumption of legal origin would arise conferring a right to use the water. 30 C. 281. **E**

(4) **Surplus water of a tank—Easement.**

A right of easement can be acquired to the surplus water of a tank, flowing through a defined channel, whether natural or artificial. 7 M. 530 **F**

(5) **Right to use a water-course in derogation of rights of adjacent owners.**

A riparian owner may, under S. 26 of Act XV of 1877, acquire an easement to the use of water of a natural stream, in derogation of the right of adjacent riparian owners, above or below the stream. 35 P.R. 1895. **G**

7.—"any other easement."—(Continued).

(E)—OF WATER.—(*Continued*).

(6) **Prescriptive claim to irrigation from a running channel.**

(*a*) A suit, to establish a prescriptive claim to irrigation from a running stream, and for damages caused by the stoppage of water by proprietors higher up the stream, will lie. W.R. (1864), 106. H

(*b*) Right to use water for irrigating land may be obtained by 20 years' user, although the modes of drawing water were different within that period. See 8 C.W.N. 158 under S. 35, *infra*. I

(7) **Riparian owner's right to construct a dam and take water for irrigation purposes.**

The plaintiffs, upper riparian owners, claimed the unrestricted right of constructing a dam and of taking water for irrigation purposes, as much water as he liked, without any proof that they had ever done so before, or that they had enjoyed the right by prescription or custom. The Privy Council held that in the absence of such right acquired by contract with lower proprietors, or by prescriptive use, the law conceded no such right. 24 C. 865 (P.C.)=24 I.A. 60. J

(8) **Right to repair or erect a bund.**

(*a*) Where it is proved that the plaintiffs had a certain right to repair a bund, it is no answer, to a claim of right, to say that the party can have another bund as good as the old. 15 W.R. 216. K

(*b*) Deprivation of the plaintiff's right to a rise of water by obstructing the repair of the bund is an injury. (*Ibid*). L

(*c*) A person will not have the right to erect a bund, in a natural flowing river, which cuts off water from the plaintiff, unless he proves that he has acquired the legal right to do so by long use. 15 W.R. 516. M

(9) **Right of villages whose lands abut on a stream to conserve water by building up a dam.**

The plaintiffs and other co-villagers, whose lands abutted on a stream, were held to be entitled to the right to conserve water, by building up a dam in it during the rainy season, for the purpose of irrigating their lands in accordance with custom and user, which had prevailed from time immemorial. 29 C. 100. N

(10) **Right of owner of two lands to use the water of one to the other.**

The owner of lands on both sides of a pyne (water-course) has the right to use the rain water over one land to the other through troughs over the water-course, before such rain water reaches the water course. W.R. (1864), 147. O

(11) **Artificial water-course, rights over—How acquired.**

(*a*) In an artificial water-course, constructed on his neighbour's land, any right to the flow of water must be based on some grant or agreement, either proved or presumed, from or with the owner of the lands, from which the water is artificially brought, or on some other legal origin. Such a right may be presumed from the time, manner and circumstance, of the enjoyment of the easement. 4 C. 633 (P.C.)= 6 I.A. 38. P

7.—" any other easement."—(*Continued*).

(E)—OF WATER.—(*Continued*).

(*b*) A person cannot obtain a right to tap another's canal, through which water from a natural stream flowed to the latter's land and abstract water therefrom for his own lands, unless he had acquired that right by grant or prescription. W.R. (1864), 319. **Q**

(12) **Right to use another's aqueduct.**

A person may acquire a right to use the waters of an aqueduct, constructed by the plaintiff upon his own land at his own expense. 15 W.R. 83. **R**

(13) **Right to water—Butwarra (partition).**

Where the parties have, by agreement in the butwarra, restricted their rights by the condition, that the plaintiff was to have the full use of water in a reservoir, others are not at liberty to put an embankment around it, even on their own land so as to diminish materially the flow of water into it. 15 W.R. 94. **S**

(14) **Drainage through artificial water-course, is no natural right.**

The right to discharge rain-water through an artificial water-course over another's land is not a natural right, but a right which a person may acquire either by express grant, or by long and continuous user. 7 W.R. 498. **T**

(15) **Right of drainage, how acquired.**

To prove a right of easement in a drain, it is not sufficient that a person has used the drain and that he has been deprived of that use by some acts of the defendants. The plaintiff must prove that he has enjoyed the easement for the time and in the manner prescribed in the Act (Limitation Act of 1871, S. 27). 25 W.R. 271. **U**

(16) **Right to discharge rain water on neighbour's roof, how acquired.**

A person's right to discharge rain water on the roof of the neighbour can only be acquired by prescription or by contract. 3 B. 174. **V**

(17) **Right of discharging rain water from a roof.**

Where the evidence showed that the defendant has allowed the plaintiff, for a number of years, to rest the thatch of a hut upon the defendant's wall, which being thrown down by the cyclone, the plaintiff rebuilt the wall and erected a thatched roof thereupon and the thatch roof had since been blown down, held that the plaintiff had not acquired a prescriptive right, that the water from the thatch in question should pass over defendant's land. 11 W.R. 508. **W**

(18) **Applicability of S. 26 of the Limitation Act, 1877.**

S. 26, Limitation Act, 1877, does not apply to a suit to remove a dam across a natural stream as it is not one to establish an easement. U.B.R. (1892—96), 642. **X**

(19) **Prescriptive right for passing surplus rain water over another's land—what must be proved.**

In order to give the owner of a land a prescriptive right for passing the surplus rain water of his land over another's land, it must be proved that the water passed through a defined channel and not in various directions through the servient tenement. 8 C.W.N. 244. **Y**

7.—"any other easement."—(Continued).

(E.)—OF WATER.—(*Concluded*).

(20) **Right of way and drainage over Municipal Highway.**

Where a part of highway had been sold by the Municipality to the defendant, thereby interfering with the plaintiff's (whose premises adjoined the land) right of way and drainage, the plaintiff had suffered a special damage, and was entitled to the right of way and drainage. 1 A. 557. **Z**

(F)—EASEMENT TO DISCHARGE SMOKE, SMELL, VAPOUR, ETC.

(1) **Easement to discharge smoke, smell, vapour or water or to make noise.**

There is no distinction between any of the cases whether it be smoke, smell, noise, vapour or water, or any other gas or fluid. Any of these rights can be acquired by 20 years' user. 22 B. 831. **A**

(2) **Market—Right to have the exclusive use of a stall.**

A person, as a member of the public, has an undoubted right to resort to the market for the purpose of selling his commodities; but a right to have a stall located in a particular part thereof can only be acquired either by grant or by prescription. 11 W.R. 112. **B**

(3) **Right of drying tobacco on certain land can be acquired by prescription.**

A person may acquire an easement by prescription to dry tobacco on certain land adjacent to their mills. 14 P.R. 1897. **C**

(4) **Planting trees on another's land—long enjoyment of fruits—effects.**

Planting a tree on another's land will not entitle the person, who does so, to the ownership of the land. But the enjoyment of the fruits of a tree for a long time may give a right to the continued enjoyment, and the owner may be restrained from cutting down the tree. P. J. (1881), 4. **D**

(5) **Prescriptive title to land.**

It is doubtful whether a title to land can be gained by prescription without adverse possession. 6 W.R. 215. **E**

(6) **Use of land for fixing plaintiff's ladder.**

Mere use of a small piece of defendant's land for fixing the plaintiff's ladder is not adverse possession, and such use even, if it existed beyond 12 years, would not give a prescriptive title to the plaintiff, nor give the plaintiff a right of easement in respect thereof. 68 P.R. 1899. **F**

(7) **Projection of balcony—Right to complain.**

Where the defendant projects his balcony on his own ground or over municipal ground so as to overlook the plaintiff's windows, the right of the plaintiff to complain about the windows is precisely the same in both cases, the sole ground on which he can complain being the infringement of his easement. 2 Bom. L.R. 454. **G**

(8) **Projection of roof over plaintiff's land.**

The plaintiff and the defendant were owners of adjoining houses separated by a lane owned by the plaintiff. Defendant's roof, built more than thirty years ago, projected over the plaintiff's lane. *Held*, that the defendant had acquired a right to it. If the enjoyment of the space was considered to be a possession by the defendant, the Limitation Act had secured for him that right, and if it was considered to be an easement, it had ripened into a right by uninterrupted user for more than 20 years. 3 B. 174. **H**

7.—"any other easement."—(Continued).

(F)—EASEMENT TO DISCHARGE SMOKE, SMELL, VAPOUR, ETC.—(*Continued*).

(9) **Non-existence of windows for a long time—Right to open windows.**

The fact that there were no windows, in the defendant's wall, for over 50 years is no sufficient ground to give the plaintiff a prescriptive right to prevent the defendant from opening a window in such a wall. 5 C.W.N. 147. I

(10) **Opening a door-way facing a common property.**

A person will be at liberty to open a door-way, in his own house, opening into a common property, if he does not thereby render such common property less useful, or does not interfere with the right which the others have acquired. 46 P.R. 1861. J

(11) **Easement of unobstructed view to a shop.**

The fact that the defendant's building a shed and putting *sirki* screens on their own land, in front of the plaintiff's shop, obstructs the view of the shop from the neighbourhood will not entitle the plaintiff to have the obstruction removed. 29 A. 22=3 A.L.J. 637=A.W.N. (1906), 257. K

(12) **Right of easement over a courtyard adjoining the plaintiff's residence.**

The plaintiffs, whose residence adjoined or was close to a place, which was found to be a courtyard, were held entitled to the use of it as an easement, and, as the use was not a public right, would be actionable without proof of any special damage. 9 A. 434. L

(13) **Owner tacitly allowing public to pray in his house.**

Where an owner of a house, by his tacit consent to the resort to the house and to the land on which it stood, for the purpose of prayer, has resigned to the defendants any right or title, that he himself may have had in it, he cannot obstruct the use of the house as a prayer house. 15 W.R. 505. M

(14) **A person cannot acquire a right by occupation or user over part of a dedicated high road.**

Where a dedication has been established of a high road and where a portion only out of the land so dedicated has been used for that purpose, no person could, by occupation or other user of any part of the road, establish a right as against the public, over any part of the land, even if it had never been used for the purpose for which it was dedicated. 20 A. 200. N

(15) **Dedication for a specific purpose is no transfer of absolute property in the soil.**

The plaintiff's father built a temple, a bathing ghat, and a room, called *ganga-jatri-ghur* and a ghat close to it, where sick persons, past all hopes of recovery, were removed and the rites performed. *Held*, that an easement merely to a certain class of persons was granted and that it was never intended to be a transfer of absolute property in the soil. 9 C. 75. O

(16) **Exclusive use of a bathing ghat.**

A person's claim to the exclusive use of a bathing ghat, not based upon any allegation of a right in the soil of the ghat or in any other soil, to which the user of the ghat is appurtenant, will not be allowed. 20 A. 200. P

7.—"any other easement."—(Concluded).

(F)—EASEMENT TO DISCHARGE SMOKE, SMELL, VAPOUR, ETC.—(*Concluded*).

(17) Right to the exclusive use as of bathing ghat for the purpose of collecting alms.

The plaintiffs' claim to the exclusive use of a bathing ghat, for the purpose of collecting alms or fees to the exclusion of other persons, cannot be maintained, where no right of any sort to the soil of the ghat or any portion thereof is asserted by the plaintiff or shown. 6 A. 39. **Q**

8.—"peaceably and openly enjoyed."

(1) Reason of the rule.

It is probable that the words, peaceably and openly, in S. 26 of Act XV of 1877, which are not in the English Act, have been introduced into the Indian Act for the very purpose of preventing such rights being acquired by stealth or by constantly contested user, although actual knowledge of the user on the part of the servient owner may not be necessary. 10 C. 214. **R**

ERRATA IN THIS PART.

At page 62, Note O, last line, *for* widows *read* windows.
,, 92, Note W, heading line, *for* agent *read* grant.
,, 94, Note H, first line, *for* use *read* sue.

See 10 C. 214 (217), under S. 15, page 45, *supra*.

(5) So, period of incapacity of servient owner is excluded in English Law.

(*a*) So, following the principle of law laid down before, the Courts have held, that the period, during which an infant, an insane person, or a married woman was the servient owner, must be excluded from the time during which a prescriptive right was in the course of acquisition. 10 C. 214. **U**

(*b*) But this rule of English Law is not applicable to India. (*Ibid*). **Y**

(6) So in a claim of prescriptive easement against Government—Knowledge of Collector not necessary.

In a claim for an easement of way by prescription against the Government, the personal knowledge of the Collector is not necessary. But, in this case, there was evidence for making the presumption that superior Government officers had knowledge of it. (*Ibid*). **W**

9.—"as of right."

(1) Enjoyment "as of right," what constitutes.

(*a*) In order that the enjoyment may be "as of right" there must be an adverse exercise of it as against the servient holder. 15 B.L.R. 361. **X**

9.—"***as of right.***"—(*Continued*).

(*b*) No rule can be laid down as to what would, or would not, constitute a continuance of the enjoyment as of right, when there was no exercise of it for any given period; this depends upon the circumstances of each case and the nature of the rights claimed. 26 C. 593=3 C.W.N. 610. Y

(2) "As of right," meaning of.

(*a*) The expression "as of right" does not mean user without trespass, but it means user in the assertion of a right. 23 W.R. 52. Z

(*b*) The phrase "as of right" does not mean a right acquired through the owner of the servient tenement, though the presumption of grant from an enjoyment of 20 years was the basis of the English Law on the subject. 7 B. 522. A

(3) "As of right" meaning under Act XV of 1877.

In a case decided under Act XV of 1877, which requires that a claim to an easement of light and air should be "as of right", the expression was held to mean open and manifest, not furtive or invisible; the phrase "as of right" does not refer to a right acquired through grant from a servient owner. 7 B. 522. B

(4) Enjoyment "as of right"—Difference between English and Indian Law.

Under the English Prescription Act, as under the common law, except in case of easement of light, all other easements must be "as of right." 1 M. 335. C

(5) User with consent is not user "as of right."

If the user is with the consent and connivance or with the sufferance of the tenants or with their permission, it cannot be as of right. P J. (1889), 196. D

(6) User by favour is not user "as of right."

To constitute a right of way, there must have been an uninterrupted user as of right, and not exercised by the mere will and favour of the other party. 17 W.R. 11. E

(7) User by permission is not user "as of right"—Landlord and tenant.

Where a tenant, by his lessor's permission, erected a dam upon his holding, and thereby obstructed the natural flow of the water, held that the mere permission did not amount to a grant of easement. 1 M.H.C. 258. F

(8) User by tenant is not user "as of right."

(*a*) There can be no easement claimed by a tenant as against his landlord. 7 M.H.C. 60 (64). G

(*b*) A tenant cannot acquire by prescription an easement of way against his own landlord. 14 A. 185=12 A.W.N. 38. H

(*c*) A tenant cannot acquire an easement by prescription against his landlord. 7 M.H.C. 342 (346). I

(*d*) Acquisition of easement as of right—Landlord and tenant. See 9 C.W.N. 856, under S. 12, *supra*. J

(*e*) Tenant and landlord—Acquisition of easement by presumption. See 29 C. 363; 1 C.W.N. 151; 14 A. 185 (**F.B.**), under S. 12, *supra*. K

(*f*) Acquisition of easement by a tenant against his landlord. See 7 M.H.C. 60, under S. 12, *supra*. L

9.—" as of right."—(Continued).

(*g*) Acquisition of easement by prescription by a tenancy against his landlord. See 1 C.W.N. 151, 29 C. 63, under S. 12, *supra*. **M**

(9) **Tenant may acquire easement for his landlord.**

A tenant can claim a right of easement over another's land for and on behalf of his landlord. 14 A. 185 (**F.B.**) = 12 A.W.N. 38. **N**

(10) **But tenant may acquire an easement by grant or by necessity or as appurtenant to his holding.**

Unless a tenant alleged that his holding had, at the time it was let to him, a right of way as appurtenant to it, or that the landlord granted any such way as appurtenant, or that the way claimed was a way of necessity, he cannot acquire a right of way over the other lands of the landlord. 14 A. 185 (**F.B.**) = 12 A.W.N. 38. **O**

(11) **Tenant may acquire a right by contract with landlord.**

Where a tenant has, for many years, used a particular piece of land, with other tenants, as a threshing floor for threshing out crops, it is competent to the Judge to find, there being no evidence to the contrary, that the right to use the plot of land for that purpose was part of the contract of tenancy. 16 A. 181. **P**

(12) **Right of pasturage--Tenant and landlord—Immemorial user.**

A tenant may have a right of pasturage on his landlord's waste lands by immemorial user. In such a case of immemorial user, the presumption is that the right has a legal origin. 8 C.W.N. 425 (**P.C.**) = 31 C. 503 = 14 M.L.J. 152. **Q**

(13) **Easement between landlord and tenant—Lease for 999 years.**

A lease for 999 years differs little from an outright grant, and there is no doubt that a landlord, by the grant of letting, may convey rights which, though not easements, are in the nature of easements to enure for the term of holding. 2 M. 46. **R**

(14) **Tenants may claim easements by custom.**

The tenants of the zamindar are entitled to set off a right of easement by custom. 18 M. 320. **S**

(15) **Grant of rights of grazing—Zamindar's power to reclaim waste.**

The words in a wajib-ul-arz providing that the village cattle may graze on waste land of the village cannot be construed as depriving the zamindar of his power to reclaim waste land. 19 A. 172. **T**

(16) **Wrongful possession of dominant tenement, effect of—Cessation of user of way.**

Where the defendant wrongfully took possession of the dominant tenement and the plaintiff ceased to use the way, which led to it over the defendant's land, it cannot be said that, during the period of dispossession (a period of more than three years), the plaintiff had an open, peaceable and uninterrupted, enjoyment of the way as of right, or that the defendant suffered such an enjoyment, although there was no attempt to exercise it. 3 C.W.N. 610=26 C. 593. **U**

(17) **Burden of proving that user was " as of right."**

(*a*) The burden of proving that an user of a right, claimed as an easement, was as of right lies on the plaintiff. 8 C.W.N. 359. **V**

9.—"as of right."—(Concluded).

(*b*) But where the defendant admits, in a suit for possession by the plaintiff, plaintiff's right to property, but claims an easement over it, the burden of proving that the defendant has used the property for a period of over 20 years, as of right, lies on him and not on the plaintiff. 26 P.L.R. 1906. **W**

(18) **Presumption is in favour of user as of right.**

The principle is that, a claim to a right of way, supported by evidence of user only, often user of another land for the purpose of a road or pathway, if continued without interruption for a long time and not attributable to permission or sufferance, induces the presumption that the user was of right. 14 W.R. 124=5 B.L.R.A.P. 84. **X**

(19) **Whether this presumption of English Law applicable to India.**

The propriety of the English rule that the presumption from user should be that it is as of right must depend upon the circumstances not only of each particular case, but also of each particular country, regard being had to the habits of the people of the country. In India, it would not be right to draw that inference. 8 C.W.N. 359. **Y**

10.—" period ending within two years ....suit."

(1) **Suit must be brought within two years from the end of the period of 20 years.**

(*a*) At whatever time the suit is brought, the enjoyment must be found to have continued till within two years of that time, and if that cannot be found, the claim should fail. 26 C. 593=3 C.W.N. 610. **Z**

(*b*) A suit to establish a claim to an easement, based on continuous user for 20 years, must be brought within two years from the end of the period of 20 years. 24 W.R. 295. **A**

(*c*) In a claim for easement of way, along a lane, into a public road and of drainage of water from the plaintiff's house into the lane, the defendant proved that he had put up a door at one end of the lane, about seven years before this suit, and the plaintiff, during that period, did not take any active step except that of stating his claim in a suit by the defendant against the Municipality to establish his right to the lane. *Held*, although it might perhaps be that merely because the plaintiff stood by, during the defendant's previous suit, he could not be said to have " submitted to or acquiesced in " the obstruction, yet the plaintiff did not enjoy the easement during the two years next before suit. 73 P.R. 1905=203 P.L.R. 1905. **B**

(2) **English Law of prescription—Period of enjoyment must continue up to the date of suit.**

Under the English Prescription Act (which was in force in India, before the passing of the Indian enactment with regard to the acquisition of easements by prescription) 20 years' continuous enjoyment up to the date of suit is necessary to establish a right of easement. 1 M. 335. **C**

(3) **Claim not based on this section—Proof of user within two years next before suit not necessary.**

(*a*) Where a claim to an easement is not based on any statutory right, but is based on a presumption of grant arising from long user, proof of user within two years next before the suit is not necessary. 6 C. 394 (P.C.) =7 I.A. 240=7 C.L.R. 529. **D**

10.—"period ending within two years....suit."—(Concluded).

(*b*) Immemorial user must be referred to a legal origin that is, either to a lost grant, or to an agreement between the predecessors-in-title of the parties. So, a person claiming an easement, based on immemorial user, does not require the aid of any statute and will not be barred, if the suit is brought after more than two years since he last enjoyed it. 6 B. 20. E

(*c*) Where there is evidence of enjoyment on the part of the plaintiff, or those through whom he claims, of such a character and duration as to justify the grant or other legal origin of the plaintiff's right, independent of the provisions of S. 26 of the Limitation Act, 1877, enjoyment within two years next before the suit is not necessary. 6 C. 812. F

(*d*) When a claim for an easement is based as a hereditary and customary right, and evidence is adduced for immemorial user, a Court will not be justified in dismissing a suit to establish an easement on the ground that there has been no enjoyment of the easement within two years next before the suit. 5 M. 226. G

(*e*) A suit to enforce a right of easement acquired otherwise than by prescription, cannot be defeated by the circumstance that the interference with the plaintiff's right occurred beyond two years prior to suit. 9 A.W.N. 133. H

(4) **Actual user not necessary.**

The word "enjoyed" does not mean "actually used." The use of the words, "actual user," in case of discontinuance of easement in ill. (*b*) to S. 26 of Act XV of 1877 was held to be inappropriate, and actual user within two years previous to the suit is not necessary. Constructive user was held to be sufficient. 7 C. 132=8 C.L.R. 281. I

(5) **Suit for revival of easement over water course—Art. 144 of Act XV of 1877.**

The period of limitation, for a suit to revive a right of easement over a water-course, enjoyed continuously for more than the prescriptive period and interfered with by the defendant by diversion of water to his own fields, is 12 years from the date of obstruction; such obstruction being of the nature of a continuing nuisance, enjoyment up to two years previous to the institution of the suit is not necessary. 4 C.P. L.R. 16. J

(6) **Such proof not necessary where easement is enjoyed only occasionally.**

In the case of a right of way for boats, during the rainy season, the plaintiffs proved their enjoyment of the way, during particular seasons of the year, for more than twenty years till a little more than two years before suit. *Held* that in such a case, actual user of the way within two years before suit was unnecessary. This case was decided under Act XV of 1877. 7 C. 132=8 C.L.R. 281. K

(7) **Claim of easement—Proof of user for 18 years.**

In a suit brought in 1878, the right to divert water, flowing in a channel, by erecting a dam was allowed on proof of the enjoyment of the right for 18 years up to 1871. 5 M. 253. L

11.—"Nothing is an enjoyment..when..had in pursuance of an agreement, &c."

(1) **Substitution of one easement for another by contract.**

Where a new way is substituted for an old one with the consent of the person entitled, and the non-user of the original way is accompanied by acts

11.—"Nothing is an enjoyment..of an agreement, &c."—(Concluded).

which warrant the Court in inferring an intention to release, the right of resumption is lost, and the non-user need not extend over any defined period. 20 W.R. 188. **M**

(2) **Right of way by contract—20 years' user not necessary.**

A party who claims the re-opening of a way under a contract is not required to prove user for 20 years. 23 W.R. 290. **N**

(3) **Agreement preventing the acquisition of prescriptive right of easement, effect of.**

Where, as between the predecessors-in-title of the parties, there was an agreement to the effect that the plaintiff's predecessor was to enjoy the access of light and air through certain windows of his house, in return for which he ought not to object to those windows being blocked when the defendant or his successor-in-title should re-build and raise his house, the plaintiff could not, so long as the agreement remained in force, acquire an easement in respect of the widows. 24 B. 156 (P.C.) = 26 I.A. 184. **O**

12.—" Nothing is an interruption, &c."

(1) **What is submission to an obstruction.**

In order to negative submission to an interruption, it is not necessary that the party interfered with should have brought an action or suit, or taken any active steps to remove the obstruction; it is enough if he has communicated to the party causing obstruction that he does not acquiesce in it. 1 M. 335 (339). **P**

13.—' When property over which right is claimed..belongs to Government.'

(1) **Crown is not included in an Act unless there be words to that effect—S. 26 of Act XV of 1877.**

(*a*) Neither S. 26 of the Limitation Act of 1877 nor the corresponding section in Act IX of 1871 is applicable to a claim against the Secretary of State on the ground of the well-established rule in England that the Crown, whose interests he represents, is not included in an Act, unless there be words to that effect. 14 B. 213. **Q**

(*b*) It is a universal rule that a prerogative, and the advantages it affords, cannot be taken away except by the consent of the Crown embodied in a statute. This rule of interpretation is well established and applies not only to the statutes passed by the British, but also the Acts of the Indian Legislature, framed with constant reference to the rules recognised in England. 1 B. 7; 14 B. 213. **R**

But, see 10 C. 214, where an easement of way was allowed against the Secretary of State for India on proof of user for more than twenty years.

(2) **Prescriptive right against Government may be acquired if prescribed by law.**

(*a*) It is consistent with the capacity of private individuals to acquire proprietary rights, by possession adverse to Government, as prescribed by Reg. V of 1827 or any other law of prescription or limitation. 1 B. 352 (361). **S**

(*b*) In a case reported before Act IX of 1871, it was held that the right to an easement in the flow of water through an artificial water-course is as valid against the Government as against a private owner of land. 5 M.H.C. 6 (19). **T**

13.—"When property..claimed..belongs to Government."—(Concluded).

(3) **Long user of water—Right of Government.**

Where a dam has been in existence for upwards of 280 years, by means of which two neighbouring villages were irrigated by two separate channels, the Government cannot interfere with the distribution of water. 7 B. 209. **U**

(4) **Kumki right of South Canara.**

The *kumki* right of land-holders in South Canara is not an easement but is a right exercised over Government waste by permission of Government. 16 M. 304. **Y**

(5) **Government land—Easement against tenant.**

Where the land belongs to Government, and is held by the parties as tenants, then no easement can be acquired by prescription against a tenant, unless and until it is also acquired against Government as reversioner or remainderman. 3 N.L.R. 114. **W**

(6) **Right to a monopoly only to be acquired by a grant from crown.**

There is nothing in both the Regulations and articles that any person is entitled to claim a right of ferry, that is to say, to a monopoly, by prescription or by any means other than a grant from the crown. 18 C. 652. **X**

(7) **Right of monopoly-holder.**

An owner of ferry, granted under a Government settlement, who plied it for hire, could restrain by suit another from running his ferry over the same spot though that other levied no tolls on his ferry, if he did not use it exclusively for the conveyance of his own servants and ryots. 4 C. 599. **Y**

14.—"Acquisition by prescription"..before Act IX of 1871.

(A)—CONFLICTING DECISIONS.

(1) **Some decisions laid down that no definite period could be prescribed.**

(*a*) No fixed period has been laid down, within which a right by prescription may be obtained in this country. 2 B.L.R.A.C. 323; 5 B.L.R. 174=13 W.R. 440. **Z**

(*b*) A right of way need not be shown by user for exactly and fully 20 years in order to give a right by prescription or presumption of grant. 7 W.R. 271. **A**

(*c*) Where there is evidence showing a long and continuous user, it is sufficient for the Court to find whether it has or has not lasted enough to confer a right to it without reference to any specific number of years. 12 W.R. 274=3 B.L.R. 325. **B**

(2) **Some cases laid down that the period of user must have been such as to create a presumption of grant.**

(*a*) Any definite period of uninterrupted enjoyment cannot be fixed as sufficient of itself to establish a right to an easement. Any period, however short, accompanied by circumstances indicative of grant might be sufficient evidence from which to presume a grant. 5 M.H.C. 6. **C**

(*b*) Where, through an opening in a tank, water flowed in, and through another, water flowed out of it, and the plaintiff was enjoying from time immemorial the tank water for irrigating his land through those openings, held that a presumption arose of the legal origin of the enjoyment, conferring a right to the use of water. 30 C. 281. **D**

14.—"Acquisition.." before Act IX of 1871.—(*Continued*).

(A)—CONFLICTING DECISIONS.—(*Continued*).

(*c*) **In one case four or five years' user was held to create such a presumption.**

In this country, where the law recognises that rights may be gained by long and continuous enjoyment, *i.e.*, by prescription, no particular period is necessary for the establishment, generally, of a prescriptive right, and in some cases, four or five years will suffice to create a legal user. 11 W.R. 236. E

(3) **In some cases 12 years' user was held to create such a presumption.**

(*a*) A grant of an easement might be presumed from a 12 years' user. 5 M.H.C. 6. F

(*b*) At least 12 years' enjoyment is necessary to constitute a legal user. 11 W.R. 522. G

(*c*) Any period shorter than 12 years, the ordinary period prescribed by the statute of limitation, is by no means sufficient to establish a title by prescription. 9 W.R. 283. See also 12 W.R. 76. H

(*d*) The length of time requisite under the law in force, prior to the Limitation Act of 1871, for the acquisition of easement by prescription was 12 years. 16 W.R. 198. I

(*e*) A person was held to be entitled to a right of way on proof of user for 12 years, the period within which an owner of land, if excluded from it, should bring his action for ejectment. 10 W.R. 452. J

(*f*) Right to outlet for water may be acquired after an enjoyment for at least 12 years. 3 B.L.R. (A.C.), 166. K

(4) **In one case the period was laid down to be that necessary for barring title to corporeal property.**

The grant of an easement may be presumed by mere continued user of the privilege, openly enjoyed by the occupiers of the dominant tenement, as of right, throughout any long period of time, without interruption on the part of the owner of the servient tenement, but with this qualification, that the user should be for at least the period of adverse possession, which will act as a bar to the expiry of a title to corporeal property. 5 M.H.C. 6. L

(5) **Some decisions laid down that 20 years' user was necessary.**

(*a*) Prior to the passing of the Act IX of 1871, in order to give rise to an easement by prescription over immoveable property, 20 years' uninterrupted user of it must be proved. 8 B.H.C. (O.C.), 69. M

(*b*) An easement of light and air can be acquired after twenty years' uninterrupted user. 1 B.H.C. (O.C.), 148. N

(*c*) In a case decided before the passing of the Indian Easements Act, the Privy Council held that the plaintiffs, in order to establish their title to an easement, would have to show an uninterrupted user of at least twenty years, with the acquiescence of the defendant, the owner of the servient tenement. 19 W.R. 194. O

(6) **Period of enjoyment required in Bombay under Reg. V of 1827.**

Thirty years of enjoyment was necessary to confer a title by prescription under Reg. V of 1827 (Bombay), and this was not affected by Act XIV of 1859. 2 B.H.C. (A.C.), 333 and 334. P

14.—"Acquisition.." before Act IX of 1871.—(Continued).

(A)—CONFLICTING DECISIONS.—(*Continued*).

(7) **In one case user for thirty years was required.**

In order to establish a right of way, a person must prove either thirty years' user or a grant. 10 B.H.C. 399. **Q**

(8) **Mere use of expressions like "formerly," "all along," &c., is not sufficient.**

(*a*) The mere use of the word "formerly," without any expression to indicate the length of time for which the right had been exercised, is insufficient to prove a legal right of user. 12 W.R. 76 (77). **R**

(*b*) It will not do to say that, "all along" or for a "long time" the plaintiff had been accustomed to enjoy an alleged easement. It must be clearly found that the right originated in some grant or valid contract, or that the right had been exercised for so long a period that such a title might be presumed. 14 W.R. 349. **S**

(*c*) A user of an easement "all along" or "from before" does not necessarily prove it. It must be proved to have existed for a time, from which the right would be gained or presumed to have been gained. 7 W.R. 1. **T**

(*d*) Where the Lower Court found that an easement was enjoyed all along, the High Court held that it might be difficult, on that finding, to come to the conclusion that there had been such an enjoyment as that required by S. 27 of Act IX of 1871. 1 M. 335 (339). **U**

(9) **Use of term 'burralur'—Sufficient proof of user for over 12 years.**

The term *burralur* means all along, and embraces a period sufficient to carry the user to a period beyond 12 years. 11 W.R. 522. **V**

(10) **Finding that user was "long since"—Appellate Court's power.**

Where the lower Appellate Court finds that the plaintiff has proved their right of user "long since," its decision cannot be interfered with in special appeal, even though not very distinct as to the period for which the right has been enjoyed. 11 W.R. 285. **W**

(11) **Easement by prescription, how acquired before enactments on easements.**

(*a*) A party claiming the right of user by prescription, over the property of another, must show, not only that the right has existed from ancient days, but also, that it has been exercised as of right. 3 B.L.R. (A.C.), 281. **X**

(*b*) A person claiming a right of easement over another's property is bound to prove that he has had the continuous enjoyment of that easement without interruption and as of right. 15 W.R. 401. **Y**

(*c*) In the absence of express legislative enactment, it has been held that uninterrupted enjoyment would constitute a title by prescription, if it has been held adversely to the owner of the land over which the easement is claimed. 13 W.R. 344 = 5 B.L.R. (Ap), 12. **Z**

(12) **Temporary occupation of land by an adjoining owner—Whether adverse possession—Easement.**

The user of a bit of land, by an adjoining owner, which is of no present use to its owner, but happens to be of use for various temporary purposes to the adjoining owner, cannot be considered to have been adverse to the owner. If it were a question of easement the case will be different. 16 B. 338 (341). **A**

14.—"Acquisition.." before Act IX of 1871.—(*Continued*).

(A)—CONFLICTING DECISIONS.—(*Continued*).

(13) **Act IX of 1871 did not exclude other modes of acquiring easements.**

(*a*) Act IX of 1871 did not exclude or interfere with other titles and modes of acquiring easements. If sufficient evidence of enjoyment is adduced to presume the existence of a grant or covenant at a distant time, such a long enjoyment must be referred to a legal origin, and the easement should be allowed. 6 C. 394 (**P.C.**)=7 I.A. 240=7 C.L.R. 529; 5 M. 226, 15 B.L.R. 361; 5 M. 253; 6 B. 20; 6 C. 84; 10 C. 214 and 15 A. 270. **B**

(*b*) Apart from the statutory right of prescription, a right to prescription at common law, by presuming an ancient grant, may exist. 1 C. 422 (430). **C**

(*c*) A right to the uninterrupted flow of water along a defined channel over the lands may exist independently of Act IX of 1871. 5 M. 226. **D**

(14) **The object of Act IX of 1871.**

The object of the Statute (Limitation Act of 1871) was to make more easy the establishment of rights of easements. But the Statute is remedial, and neither prohibitory nor exhaustive. A man may acquire a title, under it, who has no other right at all; but it does not exclude or interfere with other modes of acquiring easements. An easement may be acquired by such proof as is sufficient to create a presumption in the existence of a lost grant. 6 C. 394 (**P.C.**)=7 C.L.R. 529=7 I.A. 240. **E**

(15) **So, also, this section is neither prohibitory nor exhaustive.**

This section, being neither prohibitory nor exhaustive, does not exclude or interfere with the acquisition of easements otherwise than under it. 4 C.P.L.R. 16. **F**

(16) **Basis of prescriptive rights.**

(*a*) Prescriptive rights are founded on the presumption of grant from a long-continued, uninterrupted user and enjoyment, as of right. 15 W.R. 212. **G**

(*b*) Long and undisturbed user or possession confers title by prescription, because it is presumed to be founded on title. 6 W.R. 82. **H**

(17) **The presumption of grant is a presumption of law.**

The presumption of a right of easement by grant or Act of Parliament afforded by twenty years' user is a presumption of Law. 3 B.L.R.O.C. 18. **I**

(18) **But in 6 B.L.R. 85 it was held to be one of fact.**

Both 3 B.L.R. 18, 6 B.L.R. 85 were decided under English Law before the Prescription Act. **J**

(19) **Prescription under English Common Law.**

Under the English Common Law, there could be no acquisition of a prescriptive right of easement, unless the enjoyment was of such a nature that a grant of an easement might be presumed to have been made, which could not be the case, if the enjoyment was against the owner's consent, or without his knowledge, or with his permission. The user must also be of such a length, as to raise a presumption of grant, and for this, it was held necessary that immemorial user should be shown.

14.—"Acquisition.." before Act IX of 1871.—(Continued).

(A)—CONFLICTING DECISIONS.—(*Concluded*).

In course of time, user from the first year of Richard I, and subsequently, 20 years' continual user, was held sufficient to raise a presumption of immemorial user and distant grant. But this presumption was liable to be rebutted by proof of interruption at any time prior to the commencement of 20 years. 1 M. 335. **K**

(20) **Prescription under English Prescription Act.**

By the Prescription Act, 20 years' continuous enjoyment is all that is required by the Act to establish a right of easement; but the enjoyment must still be "as of right." This however does not apply to an easement of light, in which the knowledge of the servient owner, of the exercise of the easement, is immaterial. 1 M. 335. **L**

(21) **Effect of Prescription Act in England.**

The effect of Prescription Act has been, in England, to facilitate the acquisition of easements, by introducing a fixed and comparatively short term of enjoyment by which they may be acquired, and abolishing one of the defences, *viz.*, the plea of interruption by the servient owner, prior to the 20 years' user, available in the case of a claim at Common Law. 1 M. 335. **M**

(22) **Claim for easement by prescription under Common Law may be allowed even after Prescription Act.**

But a claimant, even after the passing of the English Prescription Act, is still at liberty to proceed at Common Law, if it pleases him to do so. 1 M. 335. **N**

(23) **The rule of English Prescription Act did not apply to mofussil in Bengal.**

In England, an easement may be claimed by a non-existing grant, after it has been used adversely and uninterruptedly for a period of 20 years; and the period of 20 years, in many cases, confers a right under the English Prescription Act. This Act, however, does not apply to the mofussil in Bengal; in the mofussil, therefore, an adverse and uninterrupted user of an easement for 12 years would confer a right to it. 9 W.R. 91. **O**

(24) **But the principle of English Act applies to this country where a right is based on long user.**

Rights of way, as well as other easements, may still be claimed in this country by prescription arising from long user; when they are so claimed, the principles, which apply to their acquisition in England, will also be applicable to this country. But those principles do not apply to the acquisition of easements under the Limitation Act. 10 C. 214. **P**

(25) **The provisions of this section do not apply to easements acquired other than under this section.**

An enjoyment of an easement for 50 or 60 years, at least, for more than 20 years, must be referred to a legal origin, and will give rise to a presumption of a lost grant. So, a person, who has proved such enjoyment need not prove enjoyment for two years immediately prior to suit. 6 C. 394 **(P.C.)** = 7 C.L.R. 529 = 7 I.A. 240. **Q**

14.—"Acquisition.." before Act IX of 1871. (*Concluded*).

(B)—BURDEN OF PROOF.

(1) **Plaintiff claiming relief for obstruction of easement—Burden of proof.**

(*a*) It lies on a plaintiff, claiming relief for obstruction of easement of light and air, to prove the presence of every element necessary to establish his prescriptive acquisition of the easement claimed. 3 N.L.R. 114. **R**

(*b*) Where the plaintiff complains of the act of the defendant, founded on an alleged right of easement, it would be for the defendant to prove that the right existed. 11 W.R. 15. **S**

(*c*) Where the plaintiff's case was that, subsequent to his purchase of a tank, the defendants had commenced to take water from the tank for their own purposes, the burden lay on the plaintiff to prove the assertion of the right—a new right. On his failure to prove it, and on the defendants proving that the right claimed by them existed and had been enjoyed for many years, the suit should be dismissed. 11 W.R. 15. **T**

(*d*) All proprietors are entitled to exercise a right to cut a bund on their own land. The right to restrain such a right can only be acquired as an easement, the burden of proving which lies on the party alleging such rights. 11 C. 52. **U**

(2) **Nature of prescriptive right claimed to be strictly defined.**

The right asserted in a claim founded on prescription must be strictly and clearly defined. 16 W.R. 198. **V**

(3) **Where there was no user for a long time, there must be room to infer enjoyment, for establishment of easement.**

There must, when there is no user of a right of way for a long time, the circumstances, from which the Court can infer the continuance of enjoyment as of right, over the whole statutory period, and the cessation of the user, must be at least consistent with such continuance. 26 C. 593=3 C.W.N. 610. **W**

(4) **Easement—Magistrate's order, effect of.**

Where a defendant, who claimed a right of way over another's land has obtained an order from the Magistrate to that effect, the onus of proving an easement does not lie on the defendant, but the plaintiff should prove that he is entitled to exclusive possession. 21 W.R. 140. **X**

(5) **Order by Magistrate under S. 532, Crim. Pro. Code, will not establish right of easement.**

The possession of an order by a Magistrate under S. 532 of the Crim. Pro. Code will not establish a right to an easement. In a subsequent civil suit, the burden of proving an easement will lie on the person who asserts such right. 2 C.L.R. 555. **Y**

16. Provided that, when any land upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years [1] exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of

Exclusion in favour of reversioner of servient heritage.

twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C had a life-interest in the land; that on C's death B became entitled to the land; and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

(Note).

1.—"Any land..held..for a term of years."

(1) Easement over land in the possession of sub-lessee—Act XV of 1877.

The plaintiff was held to have established a right of way, by prescription, over land in the possession of a Mokurari sub-lessee of the servient tenement, although the sub-lessor and the original lessor were not parties to the suit. 10 C. 214, (See also notes under S. 15). **Z**

Rights which cannot be acquired by prescription (5).

17. Easements acquired under section 15 are said to be acquired by prescription, and are called prescriptive rights.

None of the following rights can be so acquired :—

(*a*) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed (1);

(*b*) a right to the free passage of light or air to an open space of ground (2);

(*c*) a right to surface-water not flowing in a stream, and not permanently collected in a pool, tank or otherwise (3);

(*d*) a right to underground water not passing in a defined channel (4).

(Notes).

1.—(a) " A right which will tend to the total destruction, &c."

(1) Reason of the rule.

(*a*) A right of way or other easement must not be so large as to extinguish or destroy all the ordinary user or profits of property. 1 W.R. 230. **A**

(*b*) There can be no prescriptive right to injure another, even though such injury has the warrant of ancient user. 20 W.R. 237. **B**

(2) Right of fishery by inhabitants of a village.

The inhabitants of a village cannot acquire a right of fishery, either by prescription, or by custom, in certain bhills, belonging to a private owner, as the right is one, by which an unlimited number of persons could take the profits of a private property leaving nothing to the owner. 9 C. 698=12 C.L.R. 382. **C**

1.—(a) "A right which will tend to the total destruction, &c."—(Concluded).

(3) Neighbour's cow straying in a waste land, whether creates an easement.

(*a*) The owner of a piece of waste land between a public road and the village, who allowed the neighbour's cow to stray over his land on their way to pasture, cannot be held to have created an easement over the land, as the effect of it would be to deprive the land of its value by rendering its cultivation impossible. 8 W.R. 268. **D**

(*b*) No length of time will give a person a right to the promiscuous use of a whole property for the purpose of driving his cattle over it. 15 W.R. 295. **E**

(4) There can be no right of way otherwise than through a particular route.

(*a*) Mere proof of a right to pass over the land, without proving the particular route, will not entitle a plaintiff to a decree. 3 B.L.R. (A.C.), 118. **F**

(*b*) A person cannot acquire, by prescription, a right of way over the servient tenement, whether it be land or water, in every direction. He can claim a right only in a particular direction. 7 C. 145. **G**

(5) Claim to a *profit a prendre* may be acquired if it be to a limited reasonable right—English Law.

The principle of English Law, that a claim to a *profit a prendre* cannot be acquired either by custom or prescription, does not apply to a limited reasonable right, which has been fully recognised, as the mode of cultivation in use in the Konkhan. 1 Bom. L.R. 499. **H**

(6) Right of owner to maintain bund on his own land.

Where the defendant merely claims to be allowed to maintain a bund, at its usual height, so as to give him the full advantage of his tank, is entitled to it, if he has acquired an easement, and the rule laid down in Robinson *v.* Aya Krishnamachariyar (7 M.H.C. 37) has no application. The plaintiff, the upper owner, may be entitled to take measures to save his land from being submerged by water thrown back upon his land by the bund. 24 M. 202. **I**

(7) A mere possibility of total destruction at some future date cannot be considered.

A right to bury the dead near the *darga*, on another's land, may be acquired by a certain class of persons, although it is possible that, after many years, the number of tombs may increase to such an extent as to deprive the owner of the use of his field altogether. 23 B. 666. **J**

2.—"A right to the free passage of light or air to an open space of ground."

(1) A right to south breeze.

Right to the unobstructed flow of the south breeze cannot be acquired by prescription, though it might be acquired by express grant. 3 B.L.R. (O.C.), 45, *followed* in 14 A. 839. **K**

(2) Light—Extent of prescriptive right.

The only amount of light for a dwelling house, which can be claimed by prescription or length of enjoyment without an actual grant, is such an amount as is reasonably necessary for the convenience and comfort of the house. 3 B.L.R. (O.C.), 41, *followed* in 14 C. 839. **L**

3.—" Right to surface water not flowing in a stream, &c."

(1) Reason of the rule.

Surface water, not flowing in a stream and not collected in a pool, tank or otherwise, is not a subject of easement by prescription, as there is no right in *alieno solo*, except to the extent that the right to uninterrupted flow of a natural stream in its usual defined course is *jure naturae*. 11 M. 16. **M**

(2) Water not running in a defined stream is absolute property of the owner of land.

Water, not running in a defined stream, is the absolute property of the owner of the land of which it forms apart, and, before it has reached a defined stream, he may drain it off or put it to what purpose he pleases. 7 M.H.C. 37 (46). **N**

(3) Prescriptive right to throw back water and keep it standing on another's land.

A prescriptive right to throw back water and keep it standing on the land of another exists only in the case of water flowing in a defined stream and cannot apply to surface water not flowing in such stream, though it may ultimately, if not arrested, flow into a tank. 7 M.H.C. 37 (46). **O**

4.—" Right to underground water not passing in a defined channel."

(1) Reason of the rule.

The reason why underground water, not running in a defined stream, is not a subject of prescription is that there is no visible means of knowing to what extent, if any at all, the supply to the plaintiff's tank would be affected by water percolating in, and out of, the defendant's land. 11 M. 16. **P**

5.—"Rights which cannot be acquired by prescription" other than those mentioned in the section.

(1) Religious office—Prescription.

The holding of a religious office, with land attached thereto, by several *gurus* in succession, by virtue of appointment made, on each occasion when vacancy occurs, is not a holding as proprietor, so as to give the holder a right of property, but that is a holding not contemplated by the Regulation V of 1887. 6 B.H.C. (A.C.), 132. **Q**

(2) Payments made by Government to a private individual—Prescription.

(*a*) A right to have a yearly payment made by Government to a private individual is not an incorporeal hereditament, and cannot be acquired by prescription based on a continued series of voluntary payments extending over more than 30 years. 8 B.H.C. (A.C.), 166. **R**

(*b*) Where an allowance by Government was neither incidental to a hereditary office, nor a charge upon immoveable property, and was not supported by a grant from Government, the enjoyment of it for 30 years did not create a prescriptive title to it under Reg. V of 1827. 9 B.H.C. 222. **S**

(3) Right to annual allowance—'Nibandha' payable from temple funds—Prescription.

Where an allowance claimed is a fixed permanent annual payment or *nibandha*, payable from temple funds, it has been held to be immoveable property under Hindu Law. This will be true, when the right to it has been

5.—"Rights which cannot be acquired...."—(Continued).

acquired, but the above rule of Hindu Law cannot enable the plaintiffs to be regarded as in possession of immoveable estate, so as to enable the right to be acquired by prescription. 10 B. 149. **T**

(4) **Right to annual allowance from the holder of an inam—Receipt for over 100 years—Effect.**

Where the party, represented by the plaintiffs, have been in receipt of an annual allowance for a century or more from the holder of an *Inam*, the plaintiffs have acquired, by prescription, a title to the allowance, and are absolved from the necessity of showing the origin of the allowance, a sufficient consideration for its being presumed. 1 B.H.C. (A.C.), 45. **U**

(5) **Prescription applicable only to incorporeal hereditaments.**

Prescription, by immemorial usage, can, in general, only be for incorporeal hereditaments, which may be created by grant, as distinguished from corporeal property, in which livery of seisin and retention of possession are possible. 8 B.H.C.R. (A.C.), 166. **V**

(6) **Exclusive right to a portion of a bathing ghat.**

(*a*) A person, unless he is an owner, cannot acquire, by prescription, an exclusive right to the use of a portion of a bathing ghat. 20 A. 200. **W**

(*b*) No exclusive right to the use of a bathing ghat, for the purpose of collecting alms, can be acquired as an easement by custom. 6 A. 39. **X**

(7) **No exclusive right can be acquired by user to a portion of a dedicated highway.**

Where a dedication has been established of a High road, and a portion only out of the land so dedicated has been used for that purpose, no person could, by occupation or user of any part of the road, establish a right as against the public, over any part of the land, even if it had never been used for the purpose for which it was dedicated. 20 A. 200. **Y**

(8) **What amounts to dedication.**

(*a*) Where a certain piece of land is found to have been used by the public, continuously and without interruption, as a passage for more than 20 years, under such circumstances as to indicate an intention on the part of the proprietor to leave the public in undisturbed enjoyment of the land, this is more than sufficient to show a dedication or an intention to dedicate the land to public user by the proprietor. A.W.N. (1900), 128. **Z**

(*b*) Thirty years' user by the public of a portion of land belonging to a private owner may lead to the presumption of dedication to the public. If such dedication is not proved, the public may acquire a right of way by user over it. P.J. (1878), 35. **A**

(9) **No right of easement to overhanging branches.**

(*a*) A growing tree, being always in a state of change, differs from such things as eaves and projecting beams. The private nuisance caused by the overhanging boughs over the neighbour's land does not create a right of easement. 19 B. 420. But see 17 Bom. 745, *contra*. **B**

(*b*) Where the branches of a pepal tree belonging to a temple and considered holy by the Hindus, overhang the property of the plaintiff, the plaintiff is entitled to an injunction restraining defendants from obstructing him in cutting the branches, notwithstanding that such act may cause annoyance to a large number of Hindu devotees. 24 A. 499. **C**

5.—"Rights which cannot be acquired...."—(Concluded).

(10) **Nor can there be an easement to roots penetrating into neighbour's land.**
See under S. 15, *supra*.

(11) **Owner building on his land close to neighbour's well, rights of.**
A person, by merely building on his own ground close to the wall of the plaintiff's house, which it does not touch but leaves entirely undisturbed and uninterfered with, cannot acquire any right over the wall, even though he may have built no side wall to the house trusting on the plaintiff's keeping up his wall. 13 B. 79. D

(12) **Palkhi Hak, whether immoveable property—Bombay Reg. V of 1827.**
A money allowance, payable out of the Government revenue of a particular Pergunnah, for *Palkhi Hak* cannot be said to be immoveable property, under Bombay Regulation V of 1827, and will not create a prescriptive right to the allowance by the enjoyment of it by successive hereditary holders for a period of thirty years without interruption. 14 M I.A. 551. E

Customary easements.

18. An easement may be acquired in virtue of a local custom. Such easements are called customary easements (1).

Illustrations.

(*a*) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A having become the tenant of a plot of uncultivated land in the village breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(*b*) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house.

(Notes).

1.—"Such easements are called customary easements."

A.—Nature and acquisition of customary easements.

(1) **Customary easement, nature of.**
An easement is a right existing in a particular individual in respect of his land, while custom is usage attached to a locality. Though a customary right belongs to no individual in particular, yet it is capable of being enjoyed by all those who, for the time being, own land in the locality to which the right attaches. 18 M. 320 (325). F

(2) **Customary easements and prescriptive easements, difference between.**
The Act makes a distinction between a prescriptive easement and easements, which are acquired by virtue of a local custom. The latter kind is not dependent upon proof of peaceable enjoyment for 20 years. 2 Bom. L.R. 454. G

(3) **No fixed period of enjoyment necessary to establish customary easement.**
(*a*) Without a dominant heritage, there can be no easement; but there can be a customary right. No fixed period of enjoyment is laid down as necessary to establish a customary right. 20 M. 389. H

1.—"***Such easements are called customary easements.***"—(*Continued*).

A.—Nature and acquisition of customary easements.—(*Continued*).

(*b*) The statute law of India does not prescribe any period of enjoyment, during which, in order to establish a local custom, it must be proved that a right claimed to have been enjoyed, as by local custom, was enjoyed. To prescribe any such period will be inexpedient and fraught with the risk of disturbing perfectly reasonable and advantageous local usages, regarded and observed by all concerned as customs. 17 A. 87 (92). I

(4) **In one case 12 years' user was held to establish custom.**

Where, from the evidence produced in the case, it appeared that a practice was observed of directing water of a stream by erecting a dam, from time to time, during a period of 12 years, by the villagers of a certain village, including the plaintiff's father, a custom to that effect was held to have been established. But the case was decided on the presumption of a grant from a 12 years' user. 5 M. 253. J

(5) **In another case user for "many years" was held to establish a custom.**

In a suit for a declaration of the plaintiff's right to the water of the defendant's tank, for the purpose of irrigation, the plaintiff's witnesses deposed that it had been so used for many years. *Held*, that the plaintiff had proved a custom to the right claimed. 8 W.R. 311. K

(6) **Right to place tazias during Moharam is in the nature of customary easement.**

A right of placing *tazias* and celebrating Moharam on a certain piece of land is of the nature of a customary easement. 16 A. 178. L

(7) **Right of way to certain classes of persons is acquired by custom.**

Rights of way belonging to certain classes of persons or certain portions of the public are acquired ordinarily by custom. 15 C. 460 (F.B.) M

(8) **Right of fishery—Proof of immemorial usage—Effect.**

The plaintiff claimed, according to a custom, which has been in existence from time immemorial, to catch fish in a tidal river, by placing stake nets at a certain place. *Held*, the plaintiff is entitled to that right, on proof of immemorial usage, although the plaintiff may not have proved enjoyment for 60 years. 12 M. 43. N

(9) **Right to take water from another's well is a customary right— not a *profit a prendre*.**

(*a*) A claim to take water, from a well situated in another's land, is a customary right and not a *profit a prendre*. 2 M.L.J. 290. O

(*b*) Where the residents of a village, excepting certain low-caste men, have been using the water of the well, possession of a house and residence in it will entitle the person to enjoy the right, and such right is a customary easement, the dominant tenement in such a case being the possession of the house. 20 M. 389. P

(10) **Customary easements—Tenant and landlord.**

The tenants of the zamindar are entitled to set up a right of easement by custom. 18 M. 320. Q

(11) **Right to free pasturage—Customary right.**

See 14 B. 213, and 11 M. 42, noted under S. 15, *supra*.

I.—"*Such easements are called customary easements.*"—(*Continued*).

A.—**Nature and acquisition of customary easements.**—(*Continued*).

(12) **Grazing on village waste land—North-West Provinces.**

In the North-Western Provinces, there is an almost universal custom, which permits village cattle to graze on waste lands. 19 A. 172. **R**

(13) **Right of grazing—Power of zamindar to reclaim waste land.**

The words in a wajib-ul-arz, providing that the village cattle may graze on waste lands of the village, cannot be construed as depriving the zamindar of his power to reclaim waste land. 19 A. 172. **S**

(14) **Erecting a dam in rainy season to conserve water.**

The riparian holders of the villages of Mitrapur and Bijoypur are entitled, by custom and immemorial user, to the right to conserve water, for agricultural purposes, by building up a dam in the river, during the rainy season, and to allow the surplus water to run out by the sides of the dam. 29 C. 100. **T**

(15) **Right in gross—Custom.**

Where, on a waste land belonging to a zamindar, the plaintiffs, Hindu inhabitants of a certain locality, claimed a right, by custom, to go thereto at the time of the Holi festival for the purpose of burning the Holi, it was held that the claim could not be regarded as an easement, as the right was not claimed in respect of any dominant tenement to which it was appurtenant, over a servient tenement subject to it; but that it was a right by custom. 6 A. 497 = A.W.N. (1884), 186. **U**

(16) **Grant of right to bury the dead carries with it right to perform the customary ceremonies.**

The members of the families of the dead were in the habit of performing certain religious services at their tombs. The ownership of the soil, though vested in others, where permission to bury in the land was granted, subject to the custom of the community, it carries with it the right to perform all the customary rites. 26 B. 198. **V**

(17) **Exclusive use of bathing ghat, cannot be acquired as a customary easement.**

(*a*) The illustrations given to this section both imply some right of ownership, occupation or habitation of some particular place. So, where the use of a bathing ghat has been dedicated to the public, a body of persons will not be entitled by custom, within the meaning of this section, to the exclusive use of such bathing ghat. 20 A. 200. **W**

(*b*) So, also, there can be no exclusive right by custom to the use of a bathing ghat for the purpose of collecting alms. 20 A. 200. **X**

(18) **English Law—No right** *in the nature* **of easements recognized.**

It may be taken, generally, that the English Law recognises no right of the nature of easements, not being easements, other than public, as distinct from private, rights, though such rights may be limited to the inhabitants of a manor or township; but within that limit they are *publici* and not *privati juris*. 20 A. 200. **Y**

(19) **Right of privacy is recognized in the North-West Provinces.**

The right of privacy exists by custom in the North-Western Provinces, among the Hindus and Muhammadans, who observe the custom of Purda, and a neighbour should not be allowed to erect new buildings, in such a

1.—"Such easements are called customary easements."—(Continued).

A.—Nature and acquisition of customary easements.—(*Continued*).

way, as would substantially interfere with those parts of his neighbour's house or premises, which are used by *purdanashin* women. 10 A. 358. Z

(20) **Right of privacy recognized in Guzerat.**

(*a*) In Guzerat the existence of a custom of privacy has been affirmed by decisions. 5 B.H.C. (A.C.), 42, 6 B.H.C. (A.C.), 143, 8 B.H.C. (A.C.), 87, 9 B.H.C. (A.C.), 266. A

(*b*) The right of privacy does not arise from prescription, but is a creation of custom, which has been recognised in Guzerat by judicial decisions. The right, however, is limited to particular apartments secluded from general observation. 2 Bom. L.R. 454. B

(21) **But right of privacy not recognized in the Madras Presidency.**

Invasion of privacy by opening windows is not a wrong, for which an action will lie. The person, whose privacy is so invaded, has it in his power to build on his own ground so as to shut out the view from the offending window. 5 M.L.J. 26=18 M. 163, *following* 3 M.H.C. 141. C

(22) **Right of privacy, nature of.**

(*a*) The right of privacy is not an inherent right of property, and if it exists, it must be by prescription, or grant, or local usage. 14 W R. 103, *followed* in 18 W.R. 14. D

(*b*) The right of privacy which prevails in North-Western Provinces is a right attached to property and does not depend on the religion of the owner. 16 A. 69=13 A.W.N. 217. E

(23) **Right of privacy is a substantial right in this country.**

Having regard to the habits and sentiments of the natives of this country, the invasion of one's privacy cannot be treated as a mere sentimental grievance, rather than a substantial injury, for which relief can be claimed at law. 3 Agra Rep. 253. F

(24) **Right of privacy, elements necessary to establish.**

A person will be entitled to a right of privacy, if he proves (1) that the custom of domestic privacy is observed among the sections of society of which he is a member and (2) that the domestic privacy of individuals is generally regarded, among the community of that locality, as being of so much importance that, by common consent, it is considered incumbent upon owners of land and houses either to abstain from elevating their houses or to elevate them with precaution against the violation of such privacy. 19 P.R. 1882. G

(25) **Right of privacy must be strictly proved as to its existence and the building for which it exists.**

A person claiming a right of privacy must prove that the right actually exists and is enjoyed in respect of the particular building for which the right is claimed. 12 A.W.N. 159. H

(26) **Right of privacy extends only to private apartments, not to courtyards, &c.**

The customary right of privacy must be confined to private apartments and cannot be extended to courtyards and the outside of houses. 8 B.H.C. (A.C.), 87. I

I.—"Such easements are called customary easements."—(Continued).

A.—Nature and acquisition of customary easements.—(*Continued*).

(27) **But extends even to courtyard, if purdanashin women used to sleep there.**

A right of privacy by custom may exist in respect of the courtyards or the verandahs of the houses where purdanashin women in the hot weather used to sleep. 10 A. 358. J

(28) **No right of privacy to rooms used by males.**

No right of privacy can be acquired in respect of a room appropriated for the use of males. 12 A.W.N. 159. K

(29) **Infringement of right of privacy—Mandatory injunction.**

Where the findings of the lower Court show that the plaintiff is entitled to have his right of privacy observed, the Court will issue a mandatory order to compel the defendant to permanently close the door or window complained of. 10 A. 162. L

(30) **Court in granting relief will consider the degree of privacy to which plaintiff is entitled.**

The Court will not necessarily interfere in every case of disturbance of right o privacy, but must consider the degree of privacy which the plaintiff, in the circumstances of the case, will be entitled to. 91 P.R. 1869. M

(31) **So, Court will not interfere in a case, where simply a wider range of vision was acquired.**

Where a change made in the upper part of the house adjoining a street gave the owner a wider range of vision but consistent with his right of enjoyment, a neighbour on the other side of the road cannot complain of the loss of privacy. 3 N.W.P. 311. N

(32) **No injunction can be granted to restrain one from opening a door on his own property.**

(*a*) The mere opening of a door by a Mahomedan in his house, at the entrance to a Court inhabited by Hindus, will not give rise to a right of action. P.J.S.A. No. 307 of 1871. O

(*b*) An owner of a house may open a door in his house, and that will not amount to a nuisance, merely because it faces the house of a neighbour. P.J. 11th January, 1872. P

(33) **But he may be restrained from passing through that door on to his neighbour's land.**

(*a*) An injunction cannot be granted restraining the defendant from making a door-way on his own property. But the defendant may be restrained from passing to the neighbour's land by that door-way and from throwing water or anything else on the plaintiff's land from or through such door-way. P.J. (1876), p. 90. Q

(*b*) The owner of a house is not prevented from opening a door in his house, although he may not have the right to pass through the land of his neighbour towards which the door faces. P.J.S.A. No. 345 of 1872. R

(34) **Right of privacy, not lost by the fact, that house could be seen from neighbour's roof.**

The fact that the occupants of a house can, from its roof, look into his neighbour's house or yard is no ground for holding that the occupant of a higher house is at liberty to open such windows as he chooses. 108 P.L.R. 1903. S

I.—"Such easements are called customary easements."—(Continued).

A.—Nature and acquisition of customary easements.—(*Concluded*).

(35) Right of privacy—Proof of custom.

The mere fact that it is not the custom, in a certain village, for windows to be opened overlooking another's zenana, cannot give a person a right of privacy, unless the evidence goes further and shows that the villagers were in the habit of preventing their co-villagers from opening windows in such a manner. 5 C.W.N. 147. T

(36) Right of privacy cannot be claimed under S. 26, Limitation Act.

A right of privacy cannot be claimed under S. 26 of the Limitation Act. 5 C.W.N. 147. U

B.—Customary easements—Requisites and effects.

(1) Requisites of valid custom—It must be ancient, certain and reasonable.

(*a*) A custom is a rule which, in a particular family or a particular district, has from long usage obtained the force of law. It must be ancient, certain and reasonable, and, being in derogation of the general rules of law, must be construed strictly. 3 I.A. 259 (P.C.)=26 W.R. 55. V

(*b*) A custom, in order to be valid, must be certain, invariable and reasonable. The circumstances of the case must also be such, that the other party, whom it is sought to affect by such custom, may be presumed to have a knowledge of such custom. 14 M. 420 (423). W

(*c*) Unless the Court is satisfied of the reasonableness and certainty and, as to extent and application, of a local custom as regards easements, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as to suggest that originally, by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned, the Court should not decide that such a local custom exists. 17 A. 87 (92). X

(*d*) In order that easements claimed by custom may be sustainable in point of law, they must be possessed of the same characteristics as those which are essential for the validity of custom generally. They must be reasonable and certain. 21 B. 684 (691). Y

(2) Right of fishery on private property unreasonable.

Where a customary easement was claimed for fishing in the bhils of a private owner by the inhabitants of a certain village, it was held that such custom could not be treated as a valid custom owing to its unreasonableness, for, by the exercise of such a right, nothing would be left to the owner. 9 C. 698=12 C.L.R. 382. Z

(3) Exclusive right of fishing, how acquired.

The inhabitants of a village, on the bank of a tidal stream, may acquire an exclusive right of fishing, by grant from the Government or by prescriptive enjoyment, during a period, which would suffice for the acquisition of an easement against the Crown. They may also establish that right by proving that they are entitled, by custom, to prevent the exercise of similar rights by any other persons within a distance, which would necessarily injure the exercise of the right by the plaintiffs. 8 M. 467. A

I.—"Such easements are called customary easements."—(Continued).

B.—Customary easements—Requisites and effects.—(*Continued*).

(4) Custom of erecting a dam across a stream for diverting water—not unreasonable.

There is nothing unreasonable in the custom of erecting a dam across a natural stream when it is low, for the purpose of diverting water into an irrigation channel to supply the water to the land of the person so diverting. 18 M. 320. B

(5) Landlord and tenant—Customary easements to divert water—not unreasonable.

The customary right, claimed by the defendants, the permanent occupancy tenants of a zemindar, who are entitled to the soil subject to the payment of thirva, to divert water from a river, against their landlord, was held to be reasonable as it was based on long user and custom. 18 M. 320. C

(6) Customary right of inhabitant of a village to graze on Government land—not unreasonable.

There is nothing unreasonable in the custom by which the inhabitants of a village in the Bombay Presidency have the right to graze their cattle on Government land. 14 B. 213. D

(7) Right to cut brushwood for repairing water course—not unreasonable.

An easement to cut brushwood, for the repair of water courses, from lands in the neighbourhood of the watercourse, can be established by custom, and there is nothing unreasonable in such custom. 31 P.R. 1882. E

(8) Right of occupancy tenants in the Punjab to graze their cattle in the village shamilat.

See 119 P.R. 1889 under Note 4 (*b*), at p. 12, *supra*.

(9) Tenant's right to cut wood and grass from the village shamilat for purpose of sale.

See 29 P.R. 1890 under Note 4 (*a*), at p. 12, *supra*.

(10) Custom to bury the dead near the darga in another's land—not unreasonable.

The right of a certain section of the Mahomedan community to bury their dead near a darga in another's land is not an easement but is only a customary right. Such a custom cannot be considered as unreasonable, by the mere possibility that, after many years, the number of tombs may increase so much, as to deprive the owner of the use of his field or of a large portion of it. 23 B. 666. F

(11) Shop-keeper's right to stack grain in front of his shop, not unreasonable.

There is nothing unreasonable or uncertain in a custom under which a shop-keeper in a bazar is entitled, as such, to use the land in front of his shop for stacking grain. This right is not an easement but a customary right. 7 P.R. 1899. G

(12) Right of privacy to new buildings, not unreasonable.

In the case of new buildings, if the owner of an adjacent building site were, without protest or notice, to allow his neighbour to erect, and consequently to incur expenses in erecting the building or premises for the use of purdanashin women, a custom, which would prevent him, subsequently, from interfering with the privacy of such new building would not be unreasonable in this country. 10 A. 358. H

I.—"*Such easements are called customary easements.*"—(*Concluded*).

B.—Customary easements—Requisites and effects.—(*Concluded*).

(13) **Right to place tazias upon land of another—Uncertainty.**

Where the only fact proved was that different *mirasis* had, within a period of about twenty years before suit, placed, during the Moharam, tazias upon the land and had sung there, but it was not proved that there was any connection between such different *mirasis*, or that they represented the body of *mirasis* of the place, or even of the particular part of the place in which the plaintiff's land was situate, *held*, the custom was not proved on account of its uncertainty. 17 A. 87. I

(14) **Right to perform certain religious ceremonies on property belonging to a third person—Custom unreasonable and uncertain.**

In a suit for a declaration that the plaintiffs were entitled by custom to take their *jajmans* of certain specified castes to a certain portion of a house belonging to a third person, in order to perform certain religious ceremonies, it was held, on appeal, to be too uncertain and unreasonable to be granted by the Court. 4 P.R. 1896. J

(15) **Easements that are not customary rights need not be reasonable.**

Where an easement claimed is not a customary right, it need not be reasonable. 30 C. 1077. K

(16) **Proof of reasonableness and certainty of custom—Pleadings.**

When applying the tests of reasonableness and certainty to a custom, we must look carefully to the circumstances of the case and not be led too easily to hold that a custom is bad because the parties have failed, in their pleadings, to define it with accuracy. 23 B. 666. L

(17) **Burden of proof lies on those that set up a custom.**

It is necessary, that those setting up a custom, limiting the exclusive right of an owner to the use and enjoyment of land for all purposes, not injurious to the right of his neighbours, should be put to strict proof of the custom alleged by them. 17 A. 87. M

(18) **The best evidence of custom is the enumeration of instances when it was acted upon.**

The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence, but by the enumeration of instances in which the alleged custom has been acted upon. A custom to be good must be definite. 1 A. 440 (441). N

(19) **Suit to restrain certain villagers from closing a right of way—Necessary parties.**

In a suit by the plaintiff to restrain the proprietors of a path in a village from closing a pathway, it is sufficient, if the land was the shamilat of the village, to implead only such of the proprietors who obstruct the path. 41 P.R. 1888. O

(20) **Effect of a valid custom.**

(*a*) Where a custom is proved to exist, it supersedes the general law, which still regulates all beyond the custom. 12 M.I.A. 523. But see observations in 3 B. 174 (177). P

(*b*) No custom will be allowed to override the positive provisions of the Limitation Act. That Act would be made inoperative, in a great number of cases, if customs, in operation, prior to the enactment were allowed to prevent the usual effect of possession, by causing it to be referred to an understanding, not expressed, by which the enjoyment of possession was rendered not adverse. 3 B. 174 (177). Q

Transfer of dominant heritage passes easement.

19. Where the dominant heritage is transferred(1) or devolves, by act of parties or by operation of law(2), the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

Illustration.

A has certain land to which a right of way is annexed. A lets the land to B for twenty years. The right of way vests in B and his legal representative so long as the lease continues.

(Notes).

1.—" Where the dominant heritage is transferred."

(1) Purchaser of a house is entitled to a right of way which vendor had been enjoying.

The purchaser of a house acquires the right to the use of the way, over a definite path, communicating with a road, which the vendor of the house had been enjoying. 15 W.R. 526. **R**

(2) Right of way acquired by vendor—Conveyance not mentioning "appurtenances"—Right of vendee.

A vendee will be entitled to use a road, over which his vendor had acquired an easement, even though the word "appurtenances" is not used in the conveyance. If the right has not been already acquired by the vendor, the vendee, continuing the use, may rely on the user of his vendor. P.J. (1885), 20. **S**

(3) Tenants in possession of a house—Right to use a drain incidental to the occupation of the house.

Where a person has a right to the user of a drain or passage as incidental to his property, such a right may be exercised at all times and by any persons who may be placed in his shoes in regard to the property. So a tenant may enjoy the right. 6 W.R. 314. **T**

(4) Purchase of a mortgagee's interest—Easement of way.

A person purchased a part of the house, which the vendor had previously mortgaged to another. The mortgage-deed gave the mortgagee the right to use a privy and the right of way to it. The purchaser paid off the mortgage, though the mortgagee was no party to the conveyance to him by the owner, and the mortgagee signed a receipt for the payment. The purchaser would be entitled to the use of the privy and the easement of way as he should be considered to have purchased the mortgagee's interest. 18 B. 382. **U**

2.—" or devolves.....by operation of law."

(1) This section also applies to the case of an execution sale.

The rule that the right to easements goes with the property, when sold by the owner himself, applies also to the case of a sale of property by Court in execution of a decree against him. 22 W.R. 522. **V**

CHAPTER III.

THE INCIDENTS OF EASEMENTS.

Rules controlled by contract or title.

20. The rules contained in this chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed (1).

Incidents of customary easements.

And when any incident of any customary easement is inconsistent with such rules, nothing in this chapter shall affect such incident.

(Notes).

1.—"instrument or decree.....by which the easement.....was imposed."

(1) Partition decree silent about right of way—Right cannot be imported into it, unless it be one of necessity.

Where a decree, partitioning property, does not provide a right of way, a right of way cannot be imported into the decree, unless such a right of way is an easement of necessity. 76 P.R. 1900. **W**

(2) Whether principle of implied grant on severance of tenements applies to partition on a decree.

Whether the principle of presumed grant of easement, upon severance of tenements, applies to a case of partition by the act of a Court of law was raisod in this case but was left undetermined. 14 C. 797 (801). **X**

(3) The principle applies to consent decrees—whether it applies to decrees in contested suits.

But where the partition of tenements is effected not by the Court, as in a contested suit, but by the consent of the parties, the Court merely recording that consent, the principle of implied grant of easements upon severance of tenements is applicable. But the question whether the same principle is applicable in the case of a severance of tenement by the decree of Court was left undecided. 26 C. 516. **Y**

(4) Right to easement—Court-sale.

The rule that the right to an easement passes with the property, by a voluntary sale, applies also where the property is sold by Court in execution of a decree. 22 W.R. 522. **Z**

Bar to use unconnected with enjoyment.

21. An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

Illustrations.

(*a*) A, as owner of a farm Y, has a right of way over B's land to Y. Lying beyond Y, A has another farm Z, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.

(*b*) A, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by A, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers; for this is a purpose connected with the enjoyment of the dominant heritage. So, if A lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

Exercise of easement.

22. The dominant owner must exercise his right in the mode which is least onerous to the servient owner (1); and when the exercise of an easement can, without detriment to the dominant owner, be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

Confinement of exercise of easement.

Illustrations.

(*a*) A has a right of way over B's field. A must enter the way at either end and not at any intermediate point.

(*b*) A has a right annexed to his house to cut thatching-grass in B's swamp. A, when exercising his easement, must cut the grass so that the plants may not be destroyed.

(Notes).

1.—"The dominant owner must exercise his right....least onerous to servient owner."

(1) Right of way—What it imports.

A right of way imports the right of passing in a particular line and not the right of varying it at pleasure. 8 P.R. 1867. **A**

(2) Right of way—Servient owner bound to supply only space enough for the passage.

(*a*) Where the dominant owner's right over the servient heritage is only a right of way, the servient owner is bound to supply only a sufficient space for passage, and he is entitled to build on the rest of the land. P.J. (1891), 244. **B**

(*b*) A right of way merely extends to that portion of the centre of the road, which is necessary for the due exercise of the right of passage. The only obligation upon the servient owner is that he shall not unreasonably contract the width of the road, or render the right of passage less easy than it was at the time of the grant. 7 C. 145 (147). **C**

(3) Right of way from one point to another cannot be exercised in a tortuous course.

Where the right is simply to pass from one point to another, the party desiring to exercise the right cannot claim to pass in a particular tortuous and indirect course between the two points. 15 W.R. 496. **D**

(4) Right of way over water can only be claimed in a particular direction.

The right of way over water cannot be claimed in every direction, but only in a particular direction. 7 C. 145. **E**

(5) Right of way for boats includes right to carry processions.

A general right of way and passage for boats over water includes a right to carry marriage and funeral processions. 20 W.R. 293. **F**

1.—"The dominant owner must exercise his right, &c."—(Concluded).

(6) **Where dominant owner has a right of way the servient owner cannot offer another instead.**

Where a dominant owner has a right of way, the servient owner cannot obstruct it and offer another way. P.J. (1893), 473. G

(7) **Right of way not affected by the existence of another path.**

(*a*) A person's right of user over a pathway will not be affected by the fact of the existence of another path by which he might obtain access. 22 W.R. 302. H

(*b*) The existence of another way will not be a bar to a right of way limited to a particular season. P.J. (1875), 172. I

(*c*) When a person has acquired an easement of way, the owner of the dominant tenement cannot put an end to it, merely because of the existence of another pathway for the same purpose. 6 W.R. 222. J

(8) **Right of way—Common to two parties—How to be used.**

Where the plaintiffs and defendants have a right of way over a lane for the purpose of carrying away the night-soil from their premises, the defendants must use their right in such a way as would least affect the plaintiffs in the enjoyment of their premises. 8 C. 677 on appeal from 7 C. 665. K

(9) **Right of way—Extent.**

A person having a right of way over a lane cannot restrain the owner of the lane from making new doors facing the lane. But an injunction may be granted restraining the owner from using the doorway for the purpose of cleaning the privies or in any other manner to cause any obstruction to the free use of the passage. 18 W.R. 379=9 B.L.R. (O.C.), 328. L

23. Subject to the provisions of section 22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage[1].

Right to alter mode of enjoyment.

Exception.—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

Illustrations.

(*a*) A, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill, provided that it can be worked by the same amount of water.

(*b*) A has a right to discharge on B's land the rain-water from the eaves of A's house. This does not entitle A to advance his eaves, if, by so doing, he imposes a greater burden on B's land.

(*c*) A, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, of the pollution.

(*d*) A, a riparian owner, acquires, as against the lower riparian owners, a prescriptive right to pollute a stream by throwing saw-dust into it. This does not entitle A to pollute the stream by discharging into it poisonous liquor.

(Notes).

1.—" Provided he does not impose any additional burden, &c."

(1) **A man may change the mode of discharging water, if he does not impose any additional burden.**

A person, having the right to discharge water from his land to that of the plaintiff, can build a wall fitted with holes and pipes for the water to flow through, if he does not, by the alternation, impose upon the servient tenement any additional burden. P.J. (1893), 143. **M**

(2) **But collection of the rain water and discharging it in one spout will amount to imposition of additional burden.**

A right to discharge rain water, generally, over the neighbour's roof, will not entitle the dominant owner to collect it and to discharge it through one spout. Such an act will amount to an alteration of easement imposing an additional burden on the servient heritage. 12 A.W.N. 239. **N**

(3) **Right to project the roof over the neighbour's roof—Erection of weather-board underneath.**

When the dominant owner, having the right to project the roof of his house, over that of the servient tenement, erected beneath it a weather board whose length was less than that of the roof, the servient owner was held entitled to its removal, as such an act by the dominant owner interfered with the proprietary rights of the servient owner, which was only subject to the burden of receiving the roof of the dominant owner. P.J. (1893), 310. **O**

(4) **Easement to enlarged windows can only be acquired by a fresh period of enjoyment.**

Where a person opens new windows in place of old ones, but has them larger in size or at a higher level, the easement for his new windows becomes a new easement, which he can acquire only by enjoying it for the required length of time. 4 Bom. L.R. 34=26 B. 374. **P**

(5) **Alteration of the dominant heritage cannot enlarge a necessary easement.**

Where a right of way for an agricultural field arises on the severance of heritage, under S. 13 of the Act, the right would be co-extensive with the necessity or user at the time at which it came into existence, and the right could not be claimed in a timber depot into which the field was converted subsequently. 24 B. 188. **Q**

(6) **Alteration of dominant heritage cannot enlarge a prescriptive easement.**

If an easement has been acquired by prescription, the user, which establishes it, furnishes the measure for the purposes to which it may be put, and the dominant owner cannot, by merely altering the dominant heritage, substantially increase the easement. 24 B. 188. **R**

(7) **A right of way, what it imports.**

(*a*) A right of way imports the right of passing in a particular line, and not the right of varying it at pleasure. 80 P.R. 1867. **S**

(*b*) Right of way imports *ex vi termini* a right of passing in a particular line and not the right to vary it at pleasure. 4 W.R. 49 (**F.B.**). **T**

1.—"*Provided he does not impose any additional burden, &c.*"—(*Concluded*).

(8) **Right of way for one purpose may be used for another if no additional burden is imposed.**

A dominant owner having a right of way for agricultural purposes may employ it for the purposes of a cotton factory, provided he does not impose thereby any additional burden on the servient tenement. 23 B. 595 = 1 Bom. L.R. 37. **U**

(9) **Right of way from one point to another cannot be exercised in tortuous course.**

Where there is a simple right to pass from one point to another, the party entitled to it cannot claim to pass in a particular tortuous and indirect direction between the two points. 15 W.R. 496. **V**

(10) **Servient owner closing an old path and opening a new one.**

The servient owner may close the old path and open a new one, if he does not thereby render the dominant owner's right of way less easy than it has been hitherto. 22 P.R. 1888. **W**

Right to do acts to secure enjoyment.

24. The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

Accessory rights.

Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

Illustrations.

(*a*) A has an easement to lay pipes in B's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

(*b*) A has an easement of a drain through B's land. The sewer with which the drain communicates is altered. A may enter upon B's land and alter the drain, to adapt it to the new sewer, provided that he does not thereby impose any additional burden on B's land.

(*c*) A, as owner of a certain house, has a right of way over B's land. The way is out of repair, or a tree is blown down and falls across it. A may enter on B's land and repair the way or remove the tree from it.

(*d*) A, as owner of a certain field, has a right of way over B's land. B renders the way impassable. A may deviate from the way and pass over the adjoining land of B, provided that the deviation is reasonable.

(*e*) A, as owner of a certain house, has a right of way over B's field. A may remove rocks to make the way.

(*f*) A has an easement of support from B's wall. The wall gives way. A may enter upon B's land and repair the wall.

(*g*) A has an easement to have his land flooded by means of a dam in B's stream. The dam is half swept away by an inundation. A may enter upon B's land and repair the dam.

(Notes).

"Accessory rights."

(1) **Accessory rights, principle of.**

When the law gives a right, it must be understood to allow everything necessary to give effect to that right. 8 A. 467. X

(2) **Right of way to a rice merchant's granary includes right of way for his customers.**

A right of way to a rice merchant's granary through a channel includes the right of access to the merchant as well as to those who deal with him. 25 W.R. 225. Y

(3) **Right to repair pipes on another land involves a right to enter on it.**

Where the pipe and reservoirs constructed beneath a railway line belonged to a spinning and weaving company, and were used to be kept in repairs by them, they, as the dominant owners, would have the right to enter on the premises of the Railway Company, the servient owners, to effect any repair that might be necessary. 22 B. 525. Z.

(4) **Right of drainage involves the right to supervise it.**

The right of access for the purpose of supervision of the discharge of water and drainage is a necessary adjunct to the right of drainage. 49 P.R. 1900. A.

(5) **Accessory right to repair roof—How to be exercised.**

Where the plaintiff has the easement to have the roof of his house projecting and to discharge the water on the defendant's land, he can claim access to it for the purpose of repairing his wall and roof. Such a right, it was held, should be only exercised once a year after one month's notice and between the hours of 9 A.M. and 5 P.M. 15 M. 286. B

(6) **Prescriptive right to overhanging branches does not imply a right to go on neighbour's land to pick fruits.**

The right to go on the land of the plaintiff to pick the fruit off the branches is perfectly distinct from the prescriptive right to have the branches overhanging the plaintiff's land, and cannot be said to be accessory to the latter right in the sense of being within the limits of that right, however useful and even necessary it might be to the defendant in order to obtain the full enjoyment of the profits of the branches so overhanging. 17 B. 745. But see 19 Bom. 420 and 24 A. 499. C

(7) **But in 19 B. 420 it has been held that a prescriptive right to have branches overhang cannot exist.**

A prescriptive right to have the trees overhang the neighbour's land cannot be acquired. See 19 B. 420 and 24 A. 499, under S. 15, *supra*. D.

Liability for expenses necessary for preservation of easement.

25. The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

Liability for damage from want of repair.

26. Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.

Servient owner not bound to do anything.

27. The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement [1]: but he must not do any act tending to restrict the easement, or to render its exercise less convenient

Illustrations.

(*a*) A, as owner of a house, has a right to lead water and sendsew age through B's land. B is not bound as servient owner to clear the water-course or scour the sewer.

(*b*) A grants a right of way through his land to B as owner of a field. A may feed his cattle on grass growing on the way, provided that B's right of way is not thereby obstructed; but he must not build a wall at the end of his land so as to prevent B from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(*c*) A, in respect of his house, is entitled to an easement of support from B's wall. B is not bound as servient owner to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(*d*) A, in respect of his mill, is entitled to a water-course through B's land. B must not drive stakes so as to obstruct the water-course.

(*e*) A, in respect of his house, is entitled to a certain quantity of light passing over B's land. B must not plant trees so as to obstruct the passage to A's windows of that quantity of light.

(Notes).

1.—"The servient owner....is entitled to use the servient heritage in any way consistent with the enjoyment of the easement."

(1) **Servient owner may build on his land if neighbour's easement to discharge water is undisturbed.**

(*a*) An easement to have the water carried off over the servient land, does not disentitle the servient owner from building on his own land, provided only that he makes the necessary arrangements to receive the water from the mori and roof and carry it away. 20 B. 788. **E**

(*b*) Where an easement enjoyed is merely that the servient owner should receive on his premises and carry off the water without let or hindrance, the dominant owner will have no cause of action so long as the servient owner does this, and the servient owner will be at liberty to do whatever he likes with his roof. P J. 1898, p. 1. **F**

(2) **Passage for boats may be narrowed, if room be left for boats to pass.**

In a suit to have a certain channel, over which the plaintiff had a right of passage for boats, and which had been slightly narrowed by the defendant, restored to its original condition, it appeared that the narrowing had in no way interfered with the passage of even the largest boats. The suit was dismissed on the ground that the plaintiff had suffered no injury. 7 C. 145=8 C.L.R. 375. **G**

(3) **Right of way over servient tenement is no bar to its partition.**

The mere existence of a right of way over a property which is sought to be divided does not constitute a reason against such a division. 21 W.R. 152 (153). **H**

1.—" The servient owner.... is entitled to use the servient heritage in any way consistent with the enjoyment of the easement."—(Concluded).

(4) **Right to use water for irrigation—Subsequent increase in the area of cultivation.**

See 26 M. 66, at p. 36, *supra*, under **V.**

(5) **Easement of light extends to an angle of 45°—Servient owner may build if light is left to that extent.**

An easement of light to a window extends only to the access of sufficient light to the plaintiff's room through the window, which is usually considered to be light at an angle of 45°. The servient owner can build on his land, if it does not obstruct the light to that extent. 20 B. 788. I

28. With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect :—

Extent of easements.

Easement of necessity.

An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

Other easements.

The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired.

In the absence of evidence as to such intention and purpose—

Right of way.

(*a*) a right of way (1) of any one kind does not include a right of way of any other kind :

Right to light or air acquired by grant.

(*b*) the extent of a right to the passage of light or air (2) to a certain window, door, or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument (3) was made :

Prescriptive right to light or air.

(*c*) the extent of a prescriptive right to the passage of light or air (2) to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used :

Prescriptive right to pollute air and water.

(*d*) the extent of a prescriptive right to pollute air (4) or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose : and

(*e*) the extent of every other prescriptive right (5) and the mode of its enjoyment must be determined by the accustomed user of the right.

Other prescriptive rights.

(Notes).

1.—"right of way."

(1) Right to use the privy implies a right of way for sweepers to clean it.

Where land was granted on *Fazendari* tenure for the express purpose of building a house to be inhabited by the grantee, and it was found that the suitable enjoyment of the building implied the use of a privy, the right of passage impliedly granted for passage to the privy over the adjoining land of the lessor included a passage for sweepers to clean the privy. 16 B. 552. **J**

(2) Right of way to well to draw water for domestic purposes will not include a right to do so for building purposes.

A right of way to, and drawing water from, the well, for domestic purposes will not include a right to take water for building purposes. 16 B. 552. **K**

(3) Right of way for a special purpose—Extent of user.

Where a right of way for a particular purpose is proved, the number of occasions on which it may be enjoyed need not be limited to the number of occasions on which it can be shown to have been enjoyed, and the right may be exercised at all convenient times for the special purpose. 9 C. 778. **L**

(4) Right of way—Effect of change of user.

See 23 B. 595 = 1 Bom. L.R. 37, 24 B. 188 = 1 Bom. L.R. 658, under S. 23, *supra*.

(5) A right of way includes a right of way for marriage and other processions.

See 15 W.R. 46 and 20 W.R. 293, under S. 22, *supra*.

(6) Change in the mode of enjoyment of easements is not a discontinuance of the old easement; nor is necessarily an aggravation.

Where the plaintiff who was enjoying a right of way for mehters over the defendant's passage, several times in the year, for over twenty years prior to the defendant's interruption of it, began to employ Municipal servants instead of his own mehters, and the Municipal servants came and went on the passage more often than the mehters did formerly, it was held that the change of system was neither a discontinuance by the plaintiff of his enjoyment, nor an aggravation of the servitude. 13 C. 136 (**P.C.**) = 13 I.A. 77. **M**

(7) Rule that servitude for one purpose cannot be used for another—When not applicable.

The rule that a servitude gained for one purpose cannot be used for another is not applicable where the burden imposed on the servient tenement is not aggravated. Nor would a change disentitle the dominant owner to take into account the previous user. 13 C. 136 = 13 I.A. 77 (**P.C.**). **N**

2.—" right..to light and air."

(1) **A door may be an opening for receiving light and air.**

(*a*) A door, with open iron bars and two wooden shutters, made for the purpose of admitting light and air is an opening for the reception of light and air. 7 Bom. L.R. 352. O

(*b*) Where there is an aperture capable of admitting light and air, such a fact will confer the same legal right to light and air, whether it be used exclusively for the passage of light and air and termed a window, or intended to be used as a means of communication and called a door. 8 B.H.C. (O.C.), 181. P

(2) **Suit for disturbance of easement—light and air—Points to be proved.**

(*a*) In a suit for an injunction or damage for an obstruction of easement of light and air the following questions are to be considered :—(1) Has there been a diminution in the quantity of light and air which has been accustomed to enter the windows of the plaintiff's house during the whole of the prescriptive period. (2) If so, has there been a privation of light and air sufficient to render the occupation of the house uncomfortable. 29 B. 157. Q

(*b*) The combined effect of this section and S. 33 is that the mere circumstance that a plaintiff has a prescriptive right to the quantity of light that has entered certain openings of his house will not give him a cause of action, against a servient owner, for disturbance caused to that right, but he must prove that such disturbance had either materially interfered with his physical comfort or prevented him from carrying on his accustomed business as beneficially as he had done before. 7 Bom. L.R. 352. R

(3) **Extent of easement of light before the passing of the Act.**

The only amount of light which could be claimed by prescription or by length of enjoyment, without an actual grant, (before the passing of the Act), was such an amount as would reasonably be necessary for the convenient and comfortable habitation of the house. 2 B.L.R. (O.C.), 18. S

(4) **Extent of easement of light and air under the Limitation Act.**

The obstruction to the easement of light and air, not based on express grant, to be actionable under the Limitation Acts, must be such as to render the house unfit for the ordinary purposes of calculation or business. 14 C. 839. T

(5) **Change of building will not divest right to light and air if the new building only receives the accustomed light.**

No alteration in the plane of a building by advancing or setting back the building will destroy the right to light and air, so long as the owner of the dominant tenement can show that he is using, through the new apertures in the wall of the new building, the same, or a substantial part of the same, light which passed through the old apertures to the old building. 7 Bom. L.R. 73. U

(6) **Extent of easement—Suit for injunction.**

Where the defendant's house, as so far built, does, or will, if its erection is proceeded with, obstruct the right which a weaving establishment has been in the habit of receiving for the last 50 years and more, and render the weaving more difficult, the plaintiff will be entitled for the

2.—"right..to light and air."—(Concluded).

demolition of the portion built, which obstructs the light, and for an injunction restraining the defendant from raising his house any higher. 3 A.W.N. 256. **Y**

3.—"imposed by....a non-testamentary instrument."

(1) **Easement given by grant—mode of enjoyment to be gathered from the agent.**

Where a grant of a right to take water from the defendant's well was given to the plaintiff by his sale deed, the mode of enjoying the right must be gathered from the grant. 6 Bom. L.R. 287. **W**

4.—"right to pollute air."

(1) **Right to discharge smoke through smoke holes recognized by this section.**

This clause recognises expressly the right to pollute air as a right capable of being acquired by prescription. Both this and S. 4 are therefore wide enough to include an easement to discharge smoke through holes in a wall over a neighbour's land. Such a right can be acquired by prescription. 22 B. 831. **X**

(2) **Extent of quasi easements.**

See 14 C. 839 at p. 35, *supra*, (**T**).

5.—"any other prescriptive right."

(1) **Easement of right of support—Alteration in the manner of enjoyment.**

A person having the right of support to his beams from the wall of his neighbour has no right to alter the position of the beams and to insert the beams in another part of the neighbour's wall. 21 P.R. 1877. **Y**

29. The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.(1)

Increase of easement.

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased, and if the dominant heritage is diminished by diluvion, the easement is proportionately diminished.

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustrations.

(*a*) A, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. A alters the machinery of his mill. He cannot thereby increase his right to divert water.

(*b*) A has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. A extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.

(*c*) A, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on B's land. A buys a field and unites it to his farm. A is not thereby entitled to take leaves to manure this field.

(Note).

1.—"The dominant owner cannot by altering.....increase an easement."

(1) **Obstruction of light and air to enlarged windows, not actionable.**

Where the servient owner did not in any way diminish the right of light and air to window of the dominant owner by building a balcony, the dominant owner would not be entitled to any relief if the balcony obstructed the light and air to such windows enlarged subsequently. 99 P.R. 1876. Z

Partition of dominant heritage.

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: provided that such annexation is consistent with the terms of the instrument, decree or revenue proceeding (if any) under which the division was made, and in the case of prescriptive rights, with the user during the prescriptive period.

Illustrations.

(*a*) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to A, the other to B. Each is entitled, in respect of his part, to a right of way by the same path.

(*b*) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to A, the other to B. A and B are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(*c*) A, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

Obstruction in case of excessive user.

31. In the case of excessive user of an easement, the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage: provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

Illustration.

A, having a right to the free passage over B's land of light to four windows six fee by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. B cannot obstruct the excessive user.

CHAPTER IV.

THE DISTURBANCE OF EASEMENTS.

Right to enjoyment without disturbance.

32. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance (1) by any other person.

Illustration.

A, as owner of a house, has a right of way over B's land. C unlawfully enters on B's land, and obstructs A in his right of way. A may sue C for compensation, not for the entry, but for the obstruction.

(Notes).

1.—" The owner or occupier....entitled to enjoy the easement without disturbance."

(1) Disturbance of easement—Nature of relief to be awarded.

As an easement is a limiting right or a right in *alieno solo*, the relief awarded should certainly be not more extensive than what is necessary to its beneficial enjoyment. 11 M. 16. **A**

A.—Disturbance of easements of rights of way, &c.

(1) Right of way—Extent to which it can be claimed.

A person who has a right of way cannot claim anything more than that the reasonable exercise of his right shall not be obstructed. 1 C.L.R. 425. **B**

(2) Infringement of a right of way is a continuous wrong.

The infringement of a right of way is a continuous wrong, giving rise to a cause of action *de die in diem*, under S. 23 of the Limitation Act of 1877, notwithstanding the fact that the plaintiff presses his claim both under S. 26 of the Act, as also upon a previous decree, which gave him a title to the right of way. 1 C.W.N. 96. **C**

(3) Right of way not consistent with a claim to ownership.

A claim to ownership of land is quite inconsistent with a claim of a right of way over it. 1 C. 422=25 W.R. 228. **D**

(4) Right of way—Abatement of obstruction by dominant owner.

A person who has a right of way was held to have the right of pulling down a wall erected to exclude him from the way. 7 C. 665. **E**

(5) Obstruction to a public thoroughfare—Special damage must be proved—English and Indian Law.

The rule of English Law, that a man who may have committed some public injury, shall not be harassed by innumerable actions, by persons who have not sustained any special damage, embodies an equitable doctrine and should be enforced in India, in whose Courts the rule of equity and good conscience is applied. 9 M. 463. **F**

(6) Special damage must be proved to sustain an action for injury caused by obstruction to public road.

(*a*) A person will be entitled to sue in a Civil Court for an obstruction to a public road, only if he proves particular personal damage in addition to the general inconvenience to the public. 134 P.R. 1882. **G**

(*b*) A person will be entitled to use for an infringement of a public right only on proof of special damage, differing not merely in degree, but in kind, from that sustained by the rest of the public. 10 P.R. 1878. **H**

(*c*) In order to sustain an action for the removal of an obstruction in a public street, it is necessary for the plaintiffs to show, not merely that the damage he suffers is greater in degree or frequency than that suffered by the rest of the public, but that it is different in kind. 4 P.R. 1895. **I**

A.—Disturbance of easements of rights of way, &c.—(*Continued*).

(7) **But the inhabitants of a village may maintain an action if the injury be peculiar to them.**

Injury caused to the plaintiffs (inhabitants of a village), by the obstruction of a public way, leading from the village, where they lived, to that in which they had their fields and pasture, was held to be peculiar to them and to their calling, so as to entitle them to bring an action for the removal of the obstruction. 22 C. 551. J

(8) **In case of obstruction to a private right of way no special damage need be proved.**

In a suit where a right of way is claimed, which is not a right of way by the public, but a private right of way, as an easement or right by prescription, the question as to whether there has or has not been proof of special damage is immaterial. 6 C.W.N. 197. K

(9) **Road open only to a section of the community is not public road.**

Where there is a road, the privilege to use which is enjoyed only by one particular section of the community, it is not right to say that the road is a public one. 25 W.R. 233. L

(10) **Suit for a declaration of right of way by a public road will not lie.**

A suit for a declaration of a right of way by a public road will not lie, where there is no allegation of special injury or inconvenience to the plaintiff. 7 B.L.R. 184. M

(11) **Public way—Right of using it for purposes of carrying corpse.**

Where a way is a public way, all persons are entitled to a lawful use of it. Except when danger to the public health is occasioned, the conveyance of a corpse along a public way is not an unlawful use of the way. 7 M. 49. N

(12) **Public way—Powers of Magistrate under S. 532, Crim. Pro. Code (1873).**

A Magistrate will not be justified under S. 532 of the Crim. Pro. Code (1872) to prohibit the lawful use of a public way to any class of persons, except under special circumstances. 7 M. 49. O

(13) **S. 532, Crim. Pro. Code, empowers Magistrate to act only in cases where the way is a public way.**

S. 532 of the Criminal Procedure Code authorizes a Magistrate to exercise the jurisdiction it confers when the way is a public way and not when the way is not open to the use of the public. 4 M. 121 (123). P

(14) **Right of way—Power of Magistrate under S. 532, Crim. Pro. Code (1872).**

S. 532 of the Crim. Pro. Code (1872) empowers a Magistrate to prevent arbitrary interruptions, by any person, of right actually enjoyed, which have been exercised, by the public, or a person, or a class of persons. 5 C. 194=4 C.L.R. 324. Q

(15) **Obstruction to a right of way—Magistrate's jurisdiction—Crim. Pro. Code, S. 320.**

A Magistrate was bound, under S. 320 of the Code of Crim. Procedure of 1861, to investigate a case in which the complainant alleged that his right of way had been interfered with, and ought not to refer the complainant to a Civil Court. 14 W.R. (Cr), 28. R

A.—Disturbance of easements of rights of way, &c.—(*Concluded*)

(16) **Obstruction to a public road—Jurisdiction of Civil and Criminal Courts.**

(*a*) Any question as to the opening or closing of a public road belongs to the Criminal, and not to the Civil, Court, and such questions can only be inquired into in a Civil Court as auxiliary to the question whether or not any damage has been done to the plaintiff. 7 B.L.R. 184. **S**

(*b*) A Civil Court has no jurisdiction to enquire into a public right *per se*; but as auxiliary to an enquiry whether a person has been injured in his private capacity, it may enter upon such enquiry. 12 W.R. 199. **T**

(17) **Obstruction to a public road—Jurisdiction of Criminal Court and Civil Court—Defendant's right to object after decree.**

Where a suit has been entertained by a Civil Court and a decree has been awarded, it ought to be presumed that the plaintiff has a right to bring the suit in the Civil Court, and the defendant cannot object, at that stage, that the suit is not cognizable by Civil Court. 24 W.R. 413. **U**

(18) **Obstruction to a public thoroughfare—Abatement by Civil suit.**

Neither the provision in the Crim. Pro. Code for the removal of obstructions in public thoroughfare, nor the fact that a private person may be entitled to damages therefor, would interfere, in case of special damage with the plaintiff's right to have the nuisance abated by a civil suit. 3 C. 20 (**F.B.**) **V**

(19) **Right of way, whether immoveable property under S. 15 of Act XIV of 1859.**

A right of way is not immoveable property within the meaning of S. 15 of Act XIV of 1859. 17 W.R. 70. **W**

(20) **Easement of way, whether immoveable property under S. 9, Sp. Relief Act.**

An easement of way is not "immoveable property" within the meaning of S. 9 of the Specific Relief Act. 23 B. 673. **X**

(21) **Right to hold a hat is not immoveable property under S. 9, Specific Relief Act.**

A mere right to hold a *hat*, the possession of which is held by collecting tolls and rents, is not an immoveable property under S. 9 of the Specific Relief Act. 29 C. 614. **Y**

B.—Disturbance to easements of ferry, &c.

(1) **Right of ferry is immoveable property under S. 9 of the Specific Relief Act.**

A right of ferry is immoveable property or an interest therein within the meaning of S. 9 of the Specific Relief Act. 13 M. 54. **Z**

(2) **In 12 B. 221 right of fishery was held to be immoveable property under S. 9 of the Specific Relief Act.**

A right to fish to the exclusion of others from a particular part of the sea is what is termed a "common of fishery," and comes under the denomination of immoveable property contemplated by S. 9 of the Specific Relief Act. 12 B. 221. **A**

(3) **But held not to be immoveable property under S. 9, Specific Relief Act.**

A suit for the possession of a right to fish in a Khal, the soil of which does not belong to the plaintiff, does not come within the provisions of S. 9 of the Specific Relief Act. A dispute as regards a right of fishery does not amount to a dispossession from any immoveable property under S. 9 of the Specific Relief Act. 18 C. 80. **B**

B.—Disturbance to easements of ferry, &c.—(*Concluded*).

(4) In 19 C. the matter was referred to the Full Bench which decided that it was not immoveable property.

A suit for the possession of a right of fishery in a pond, the soil of which pond does not belong to the plaintiff does not come within the provision of S. 9 of the Specific Relief Act. So, a person who has for a time exercised the exclusive right of fishing in water which covers the land which does not belong to him, and who is forcibly prevented from fishing in such water cannot maintain an action for such prevention under S. 9 of the Act. 19 C. 544 (**F.B.**) **C**

C.—Disturbance to easements of light and air.

(1) Access of light and air not acquired as an easement—Obstruction with the permission of the adjoining owner.

Where a right to light and air has not ripened into an easement, a person who has received permission from the owner of the land adjoining the windows may obstruct the right, and no action lies against him. 19 A. 153=17 A.W.N. 22.

(2) Obstruction to light—not actionable unless the easement has been fully acquired.

Where the owner of the adjoining land or some other person acting with his permission, obstructs the light flowing to the plaintiff's land, the plaintiff cannot have any action unless he has acquired an easement. 19 A. 153=17 A.W.N. 22. **D**

(3) Doorway used for light and air cannot be used as a means to acquire an easement of drainage.

Where a doorway is used as a means of getting air and light, without interfering with the privacy of the neighbours, the owner is entitled to keep it open; but he will not be entitled to use it as a means of a getting an easement, in the shape of a drain over the neighbour's land. 25 W.R. 221. **E**

(4) Easement of light—Extent of the right.

See 20 B. 788 under S. 27, *supra*.

(5) Access of light and air not enjoyed as easement—Obstruction by a mere wrong-doer.

It is not necessary for the plaintiff, who received light through a window in his wall, opening on a piece of vacant ground, the property of Government, to establish his prescriptive right against the defendant, who was a wrong-doer; and the mere fact of the plaintiff's enjoyment was sufficient to entitle him to an injunction. 5 M.L.J. 24. **F**

(6) Obstruction to ancient light not justified by existence of other windows.

Ancient lights cannot be obstructed by a party owning the neighbouring land by building on it, so as to obstruct the light and air always enjoyed, even though the party complaining has other windows on another side of his premises. 3 W.R. 29. **G**

(7) Construction of an upper story—Neighbour raising a wall—Right of action.

A person, who builds an upper story to his house, overlooking the inner apartments of the defendant, cannot complain, if the defendant thereupon builds a wall depriving the plaintiff of light and air, as he is the first and greater wrong-doer. 5 W.R. 208. **H**

D.—Disturbance to easements of drainage, support, &c.

(1) **Party-wall—Insertion of beams—when actionable.**

Where one of the owners of a party-wall, in constructing his house, inserts beams and pillars into the wall, the other owner has a right to complain, only if the alleged acts amount to his ouster or to a destruction of the party-wall. 6 Bom. L.R. 682. I

(2) **Obstruction to a tidal stream—When actionable without proof of actual damage.**

Where the defendant encroached on the bed of a tidal and navigable river, which was the soil of the Government, without causing any sensible injury to the plaintiff, an owner on one side of the river, it was held that the plaintiff is not entitled to sue. But the case would have been different if the claim of the defendant was based on a right of easement, where any change in the accustomed flow of water would be actionable without proof of actual damage, immediate or even probable. 5 C.L.R. 97 (P.C.)=6 I.A. 190. J

(3) **Right to discharge water on neighbour's roof—Extent of the right.**

See 20 B. 788 under S. 27, *supra*.

(4) **Discharge of drainage upon lower adjoining lands.**

There is a well-recognised servitude of lower lands to receive the natural drainage of adjoining land on a higher level. Where such waters from the plaintiff's land have been accustomed to escape in a particular direction and in certain separate passages across the defendant's land, the defendant cannot now do anything which would interfere with the plaintiff's right in this respect. 10 C.L.R. 396=8 C. 468. K

(5) **Easement of drainage—Access to the highway—Obstruction by Municipality.**

Where a Municipality closed a portion of a highway without providing adequately for the plaintiff's drainage and his access to the highway, relief may be granted to the plaintiff. There is nothing in Act XV of 1873 (North-Western Provinces and Oudh Municipalities), which debars the civil Courts, from entertaining suits, and giving relief, in respect of any civil right which may be shown to have been infringed, by the exercise by the Municipality of its powers under that Act. 1 A. 557 (560). L

Suit for disturbance of easement.

33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement (1), or of any right accessory thereto; provided that the disturbance has actually caused substantial damage (2) to the plaintiff.

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section 34.

Explanation II. (3)—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section, unless it

falls within the First Explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

Explanation III. (4)—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

Illustrations.

(*a*) A places a permanent obstruction in a path over which B, as tenant of C's house, has a right of way. This is substantial damage to C, for it may affect the evidence of his reversionary right to the easement.

(*b*) A, as owner of a house, has a right to walk along one side of B's house. B builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to A.

(Notes).

1.—"suit for compensation for the disturbance of easement."

(1) **Disturbance, meaning of—English Law.**

The term disturbance is a term possessing a special legal significance in English Law, and means an illegal obstruction, for which, if done, a suit will lie. 7 Bom. L.R. 825 (828). **M**

(2) **Obstruction to the use of water—Suit may be maintained without asserting proprietory right.**

A person may sue for damages for obstruction in the exercise of a right of *usucapio* over water, without asserting any proprietory right over the tank. 1 N.W.P. 22. **N**

(3) **Disturbance of easements of light and air.**

See under Expls. II and III, *infra*.

(4) **Suit for disturbance of easements of privacy.**

See under Expls. II and III, *infra*.

(5) **Suit for disturbance of easements of water.**

See under Expls. II and III, *infra*.

(6) **Suits for disturbance of easements of way, &c.**

See under Expls. II and III, *infra*.

(7) **Nature of relief to be awarded in case of disturbance of easement.**

As an easement is a limiting right or a right in *alieno solo*, the relief awarded should certainly not be more than what is necessary for its beneficial enjoyment. 11 M. 16 (19). **O**

(8) **Suit for disturbance of ancient light and air—Jurisdictional value.**

The value of a suit for the purpose of jurisdiction, for an injunction against the defendant to remove an obstruction to ancient light and air to a window, is the difference between the value of the room if the window is blocked up and the value if it is not blocked up. 52 P.R. 1887. **P**

1.—"suit for compensation for the disturbance of easement."—(*Concluded*).

(9) **Refusal of relief on the ground that obstruction to easement was a new case, raised in appeal.**

Where the plaintiff, having proved his right of way over *khadki*, complained of obstruction to that right, the appellate Court will be acting wrongly and too technically in refusing relief to the plaintiff, on the ground, that the plea of easement was a new case, not having been raised either in the plaint or in the issues. P.J. (1897), 270. **Q**

(10) **Obstruction to a water course is a continuous wrong—Cause of action accrues** *de die* **in** *diem*.

(*a*) An obstruction to a water course, being a continuous act of wrong. as to which the cause of action accrues *de die* in *diem*, a suit, complaining of such obstruction, would not be barred, even though brought after more than two years from the date of obstruction. 6 C. 394 (**P.C.**) =7 I.A. 240=7 C.L.R. 529. **R**

(*b*) A lower riparian proprietor's obstructing the flow of drainage water from an upper riparian proprietor's land is a continuous wrong, giving rise to a continual cause of action from day to day as long as the obstruction continues. 1 M. 335. **S**

(*c*) The diversion of a water-course is a continuous wrong giving rise to a cause of action from day to day as long as the diversion continues. 5 M.H.C. 6. **T**

(11) **Obstruction to egress of rain water on defendant's land is a continuous wrong.**

An obstruction caused to the immemorial egress of rain water from plaintiff's house through a drain on the defendant's land is an instance of a continuous wrong. 6 B. 20. **U**

(12) **So also an infringement of a right of way is a continuous wrong.**

1 C.W.N. 96.

(13) **Right of ferry, violation of—continuous wrong.**

The violation of a right of ferry is a continuous wrong. 18 C. 652. **V**

(14) **Continued user of easement causing injury to servient tenement—Continuous wrong.**

Injury to the servient tenement, accruing from a continued user of an easement, is a continuous wrong, giving rise to a continual cause of action every time the injury is caused. 7 N.W.P. 293. **W**

(15) **Subsidence of land by the act of the defendant—Fresh cause of action for each subsidence.**

See 18 C. 91 (96) under S. 34.

(16) **Interference with flow of water—Limitation—Act XIV of 1859.**

A suit to recover damages caused by the interference with the plaintiff's right to the flow of water from a canal must be brought within six years, if the plaintiff, at the time of the suit, is in possession of such right. If not, the period of limitation is twelve years. 3 M.H.C. 111. **X**

2.—"substantial damage."

(1) **Act done by many may cause substantial damage though, if done by one, it may not do so.**

An act which might be no nuisance if done by one may become a serious nuisance, causing substantial damage, if done by many. 7 C. 665. **Y**

2.—"substantial damage."—(Concluded).

(2) **Threatened damage is no substantial damage—Damages cannot be awarded.**

(*a*) Where a person threatens to invade another person's right, damages cannot be assessed as they cannot be ascertained. 5 Bom. L.R. 446. **Z**

(*b*) Thus a person will not be entitled to sue for the removal of trees, planted on the defendant's land, on the ground, that they will interfere with his enjoyment of the property, if they are allowed to grow. Until the plaintiff's enjoyment is directly and immediately interfered with, the defendant has the right to grow trees on his own land. 5 A. 369= 3 A.W.N. 58. **A**

(*c*) **Threatened injury to an easement—Whether damages awardable—English and Indian Law.** See 13 B. 252 and 18 B. 474, under S. 35, *infra*.

(3) **Prospective damage cannot be ground for granting permanent injunction.**

Where the alleged damage to an easement is merely prospective, but not actual, the plaintiff will not be entitled to a permanent injunction. 22 P.R. 1888. **B**

(4) **Invasion of privacy—Substantial damage.**

Where the defendant opened certain apertures towards the plaintiff's house, which was already overlooked by the defendant's house in several places, *held* that there was a substantial and material invasion of the right of privacy. 4 A.L.J. 445. **C**

3.—Expl. II—"Where easement disturbed is....right to light."

4.—Expl. III—"Where easement disturbed is....right....to air."

(1) **Obstruction to light and air, in order to be actionable, must cause positive discomfort.**

(*a*) To constitute an actionable obstruction of ancient lights and unrestricted flow of air, it is not enough that the light is less than before and the plaintiff enjoys a less flow of air. The test is whether the obstruction complained of is a nuisance. 9 C.W.N. 543. **D**

(*b*) An obstruction to light and air is not actionable, if it leaves sufficient light and air for the convenient habitation of the room. 2 C.L.R. 377 (380). **E**

(*c*) To constitute an obstruction of light by the defendant, actionable, there must be a substantial privation of light, so as to render the occupation of the plaintiff's house uncomfortable, according to the ordinary notions of mankind, and it is not enough that the light is less than before. 7 Bom. L.R. 73 (76). **F**

(*d*) In England an aperture is made for light. In this country the object is precisely the reverse, *viz.*, to get as much air as possible and to exclude the superfluous light. But, following the decision in *Bagram v. Khettranath Karformah* it was decided that an obstruction to air to be actionable must amount to nuisance or be injurious to health. 15 B.L.R. 361. **G**

(*e*) **Extent of ancient light—when does obstruction to light become actionable.** See 3 B.L.R. 18 and 14 C. 839, under S. 28, *supra*.

(2) **But actual damage need not be proved.**

Where a plaintiff is claiming relief, upon the ground that his prescriptive right to the passage of light and air to a certain window has been interfered with, it is enough to show that the right has, in fact, been interfered with. The plaintiff is not obliged to go further and show that he has suffered actual damage thereby. A.W.N. (1907), 175. **H**

3.—*Expl. II*—"*Where easement disturbed is....right to light.*"—(*Concluded*).
4.—*Expl. III*—"*Where easement disturbed is....right..to air.*"—(*Concluded*).

(3) **Test of comfort must be in reference to the present state of the property.**

For the purpose of applying the test of the plaintiff's physical comfort in relation to the access of light and air to his house, the Court must look to the state of the property as it is, and not as it was, or as it may be. It is a present fact uninfluenced by past history or future fate. 7 Bom. L.R. 825 (829). I

(4) **But in another case it was held that a future possible use also may be considered.**

Regard must be had, not merely to present, but also to the future possible use of property, in considering the amount of injury caused to a person by the obstruction to his ancient light. P.J. (1895), 272. J

(5) **Interference with ancient light and air is *prima facie* a serious injury.**

An interference with the access of light and air to a window of a dwelling house is *prima facie* an injury of a serious character, and the access of air in this country is hardly of less importance than that of light. 8 B. 95. K

(6) **Surrender of one of several sources of light—Effect.**

Where a plaintiff, having several sources of light, does anything permanent so as to materially interfere with any one of them, and to considerably diminish the light coming therefrom, his act will be treated as equivalent to a surrender of his right, and the question of material diminution of comfort must be determined as if that light still substantially exists. To determine the question of physical comfort by the light of such diminution, caused by the plaintiff's own act, would be to impose a greater burden on the servient heritage than it is liable to according to law. 7 Bom. L.R. 352. L

(7) **Obstruction to an enjoyment of light and air, not amounting to a prescriptive right, by a wrong doer.**

See 5 M.L.J. 24, under S. 32, *supra*.

(8) **Obstruction to light and air not amounting to a prescriptive right by owner of adjoining land or with his permission.**

See 19 A. 153, under S. 32, *supra*.

(9) **Suit for disturbance of easement of light.**

See 7 Bom. L.R. 352, under S. 28, *supra*.

(10) **Extent of easement of light and air—Suit for disturbance of light and air.**

See 29 B. 157, under S. 28, *supra*.

34. The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained.

When cause of action arises or removal of support.

(**Note**).

Subsidence of land by the defendant's act—Fresh cause of action for each subsidence.

A subsidence of land, attributable either to the act or default of the defendant, is itself an interference with the plaintiff's enjoyment of his own property, and as such constitutes the plaintiff's cause of action; the right to sue accrues upon the happening of a damage by reason of the subsidence arising from the defendant's Act. For each subsequent damage caused by a fresh subsidence, a fresh cause of action accrues. 18 C. 91 (96). M

35. Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement—

Injunction to restrain disturbance.

(*a*) if the easement is actually disturbed,(1)—when compensation for such disturbance might be recovered under this chapter;

(*b*) if the disturbance is only threatened or intended (2) —when the act threatened or intended must necessarily, if performed, disturb the easement.

(Notes).

1.—"Injunction may be granted....(a) if the easement is....disturbed."

INJUNCTIONS.

(A)—NATURE AND OBJECT OF—

(B)—RULES REGULATING THE GRANT OF INJUNCTIONS—

(*a*) IN CASES OF INVASION OF RIGHT TO LIGHT AND AIR.
(*b*)——————————————RIGHT OF WAY.
(*c*)——————————————RIGHT OF PRIVACY.
(*d*)——————————————RIGHT OF DRAINAGE, &c.

(C)—JURISDICTION AS TO, AND ENFORCEABILITY OF, INJUNCTIONS.

(A)—NATURE AND OBJECT OF INJUNCTIONS.

(1) Injunctions are either prohibitory or mandatory.

Injunctions are either prohibitory or mandatory. The former puts a stop to something in progress, by forbidding future action; the latter conveys an order to undo that which has been done. 3 N.L.R. 114 (117). **N**

(2) Interim injunctions may sometimes be granted.

In a suit brought by the plaintiff, to obtain an injunction, to restrain the defendant, from constructing a building, so as to cause obstruction to the ancient light of the plaintiff, the Court granted an interim injunction, from further proceeding with the building, upon the terms of the plaintiff submitting to obey any order the Court might make as to loss or damage, that might be caused to the defendant by making such order. 8 B.H.C. (O.C.), 181. **O**

(3) Object of mandatory injunction.

The object of a mandatory injunction is to restore things to their original conditions, and not to create a new state of things. Hence, a defendant who has made a roof which interferes with the privacy of the plaintiff's house cannot be ordered to erect a wall on the roof so as to prevent a view of the plaintiff's house being had from the roof. 1 A.L.J. 118. **P**

1.—"Injunction may be granted....(a) if the easement is.... disturbed."—(Continued).

(A)—NATURE AND OBJECT OF INJUNCTIONS.—(*Contd.*).

(4) **Injunction does not run with the land.**

An injunction does not run with the land. Hence, if the property, regarding which an injunction is granted, is sold in execution of a decree, the vendee thereof cannot be made amenable to the injunction. 3 Bom. L.R. 564. **Q**

(5) **Grant of injunction—Matter of discretion—English and Indian Law.**

Both in India and in England, the granting of injunctions is always a matter for the discretion of the Court in every case. Where the discretion has been properly exercised and is supported by valid reason, a Court of appeal will ordinarily refuse to interfere. But, where a mandatory injunction is issued, arbitrarily, appellate interference, even in second appeal, is not only justifiable but legally necessary. 3 N.L.R. 114 (120). **R**

(6) **Right to obtain injunction—Specific Relief Act, S. 54—English and Indian Law.**

The rule laid down in the Specific Relief Act and this Act differs from the rule obtaining in English law. According to the law in England, the right to an injunction is *prima facie* a right to which a plaintiff is entitled on proof that material injury has been sustained, provided that no circumstances are disclosed to deprive him of that right; whereas under the Indian case an injunction is not to be given when the remedy in damages is considered to be adequate. 22 M. 251. **S**

(7) **Indian Statute Law on injunctions follows the English precedents.**

The whole law of relief by injunction is a creation of equity, and in England, until the Judicature Act, 1875, was practically exercised only by the Court of Chancery. In India, the granting of injunctions is regulated by Ss. 54 and 55 of the Specific Relief Act. These sections have never been understood as introducing new principles of law into India, but rather as an attempt to express the rules, acted upon by the Courts of Equity in England. 3 N.L.R. 114. **T**

(8) **Easement not affected by change in dominant or servient heritage—Indian and English Law.**

The Indian Statute follows English Law in the rule that, with specified exceptions, no easement is affected by any change in the extent of the dominant or servient heritage. 3 N.L.R. 114. **U**

(9) **Injunction may be granted when substantial injury is caused.**

It was never the intention of the Legislature that a man should not get an injunction, unless the property would be practically destroyed, if the injunction were not granted. It is enough, to grant the injunction, that substantial injury to the plaintiff's right was caused. 19 A. 259 (261)=17 A.W.N. 43. **V**

(10) **Substantial injury indicates something more than mere obstruction.**

In order that an injunction may issue for a disturbance of easement, there must be an apprehension of something more than a mere obstruction. 7 Bom. L.R. 825. **W**

(11) **Continuing actionable nuisance—Overhanging trees—Mandatory injunction.**

A mandatory injunction, is ordinarily, the proper remedy in cases of continuing actionable nuisance such as branches overhanging and roots penetrating into adjoining land. 31 C. 944=8 C.W.N. 710. **X**

1.—" injunction may be granted..(a) if the easement is..disturbed."—(Ctd.)

(A)—NATURE AND OBJECT OF INJUNCTIONS.—(*Continued*).

(12) Injunctions granted by the lower Court—Burden of proof on appeal—Improper exercise of discretion to be proved.

Where a lower Court has exercised a discretion in granting an injunction, the party affected by the injunction ought, in order to succeed, to show in appeal, that the lower Court wrongly exercised its discretion. 12 A. 436=10 A.W.N. 95 (**F.B.**). **Y**

(13) Injunction cannot be refused on the ground that it would offend the religious feelings of a people.

Where certain branches of a pipal tree, belonging to a temple, overhung the plaintiff's property, the plaintiff is entitled to an injunction restraining the defendant from obstructing him in cutting it; and the fact, that the granting of an injunction would offend the religious feelings of a community, is immaterial. 24 A. 499=20 A.W.N. 69. **Z**

(14) Suit for mandatory injunction may be maintained by one having a mere right of user.

The Court may grant a mandatory injunction against a person, compelling him to remove a building erected by him on land over which he was not entitled to build by reason of the plaintiff's right of user over such land, though he is not entitled to proprietary possession of it. 20 A. 345. **A**

(15) In a suit to establish ownership, Court cannot decide the question of easement over it.

In a suit brought to establish a right of ownership, it is not competent to the Court to enter into and decide the question of the right to an easement over the same. Where the plaintiff sued for restraining the defendant from obstructing him from raising a door across a lane, on the ground the lane was his exclusive property, the Court could not decide the question that both the plaintiff and the defendant have the right of easement over the lane, on plaintiff's failing to prove his ownership over the land. 2 M.L.J. 257=15 M. 489 (490). See also 2 B.H.C. (A.C.), 176. **B**

(16) Injunction and damages may be granted in one suit.

The decree of the lower Court granting a mandatory injunction for the removal of a building which obstructed the ancient lights of the plaintiff, together with damages for the injury already sustained, was confirmed by the High Court. 2 B. 133. See also 12 C. 323. **C**

(17) When damages instead of injunction may be given.

(*a*) It may be stated as a good working rule that (1) if the injury to the plaintiff's legal rights is small, (2) and is one which is capable of being estimated in money, (3) and which can be compensated adequately by a small money payment, (4) and the case is one in which it would be oppressive to the defendant to grant an injunction, then damages in substitution for an injunction may be given. In any instance, in which a case for injunction has been made out, if the plaintiff, by his acts or laches, has disentitled himself to the injunction, the Court may award damages. 3 N.L.R. 114 (127). **D**

1.—"injunction may be granted..(a) if the easement is..disturbed."—(Ctd.)

(A)—NATURE AND OBJECT OF INJUNCTIONS.—(*Continued*).

(*b*) In a case of obstruction to eaves, the judge, in order to decide whether damages or mandatory injunction is the proper remedy, must find the following issues :

1. Has the plaintiff acquiesced in the defendant's building, or warned the defendant to desist from such building, and at what stage of the building operation was such warning given ?
2. How soon after the plaintiff's eaves were removed, did the plaintiff take legal proceedings against the defendant ?
3. Can the injury, caused to the plaintiff by the removal of his eaves, be adequately compensated by damages, and, if so, what damages should be awarded. 16 B. 533 (535). E

(18) **Where injury to plaintiff is small, damages may be given instead of injunction.**

Injunction was refused on the ground that the proved diminution of light and air was not such as to materially interfere with the comfort of the plaintiff in the enjoyment of the house, and only damages were awarded. 13 B. 252. F

(19) **Mandatory injunction may be refused if plaintiff be guilty of laches.**

(*a*) Though the plaintiff may be entitled to a mandatory injunction for the removal of a building, the Court would refuse to grant such relief, if the plaintiff be guilty of laches in bringing the suit. 20 A. 345. G

(*b*) Where a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building complained of by him had been completed, a mandatory injunction for the removal of the building so erected will not generally be granted. 16 C. 252. H

(*c*) The High Court declined to interfere with the decree of the lower Court refusing to grant a mandatory injunction, for the obstruction of light and air, based on the ground that compensation afforded adequate relief, and that the plaintiff was not entitled to injunction on account of his delay. 16 A. 69 (72). I

(*d*) Prompt action on the part of the plaintiff is very essential, if injunction is the desired remedy. 18 B. 474. J

(20) **Notice given two days after completion of building, no laches.**

Where a plaintiff, entitled, as of right, to light and air through a window, subsequently enlarged it, and on the light thereto being interfered with by the defendant, gave him notice to remove the obstruction two days after the building had been completed, *held*, that he had been guilty of no delay in taking steps to prevent the obstruction, and that he was entitled to a mandatory injunction requiring the defendant to remove it. 7 C. 453. K

(21) **Eaves projecting on plaintiff's land—Mandatory injunction.**

The Court refused to grant a mandatory injunction for the removal of eaves projecting on the plaintiff's land, when the suit was brought more than a year after the construction of the eaves. But an injunction restraining the defendant from letting water through the eaves on plaintiff's land was granted. P.J. (1891), 287. L

1.—" injunction may be granted..(a) if the easement is..disturbed."—(Ctd.)

(A)—NATURE AND OBJECT OF INJUNCTIONS.—(*Continued*).

(22) But where utility of the dominant heritage is substantially lessened injunction may be granted.

Where a room, after the obstruction caused to its light and air, could not be as substantially useful as before, damages would not be an adequate compensation and the Court would be justified in granting a perpetual injunction. 13 B. 647. M

(23) Obstruction of ancient lights—Delay in bringing a suit for injunction—Acquiescence.

The delay of a person, whose ancient light has been obstructed, in bringing a suit against the defendant for injunction, does not necessarily imply acquiescence. 2 B. 133. N

(24) But sometimes acquiescence may be inferred from conduct.

The plaintiff, the dominant owner, in allowing the servient owner, to erect a house on the pathway, over which he had an easement, and to enjoy it for seven years, was held disentitled to an injunction, as his conduct warranted an inference that he had acquiesced in it. 10 W.R. 316. O

(25) Mandatory injunction not granted when it would be much more oppressive to defendant than beneficial to defendant.

(*a*) Where a person allows a structure, which obstructs his easement of light and air to be completed, the Court may not give a mandatory injunction, in cases where, by granting a mandatory injunction, the injury to the defendant will be out of all comparison to the injury to the plaintiff by the obstruction of his easement. 3 N.L.R. 114. But see 2 B. 133 (139). P

(*b*) In granting or withholding an injunction, the Courts should exercise a judicial discretion, and weigh the amount of substantial mischief, done, or threatened to be done, to the plaintiff, and compare it with that which the injunction, if granted, would inflict upon the defendant. 14 C. 189. [See 2 B. 133 (139)]. Q

(*c*) Where the defendant, having built on his own ground a wall, obstructed the plaintiff's apertures for the egress of smoke and ingress of air, the Court considered that the making of corresponding apertures in the wall of the defendant would suffice and that it was not necessary to pull down the wall. 6 W.R. 86. R

(26) But the mere fact that defendant will suffer more by injunction is no ground for refusing it.

The mere fact, that the defendants will suffer more by the demolition of the house than the plaintiff if he is allowed money compensation for the obstruction of light, is, except under special circumstances, no ground for depriving a plaintiff of the relief to which he is otherwise legally or equitably entitled. 2 B. 133 (139). But see 3 N.L.R. 114=14 C. 189, 6 W.R 86. S

(27) Excessive enjoyment of easement—Injunction.

It would be very dangerous to hold that any trifling excess in the exercise of a servitude should justify the pulling down of the building creating the excess. 6 M.H.C. 112. T

1.—" injunction may be granted..(a) if the easement is..disturbed."—(*Ctd.*)

(A)—NATURE AND OBJECT OF INJUNCTIONS.—(*Concluded*).

(28) **Mandatory injunction against a trespasser.**

A mandatory injunction cannot be granted, compelling a trespasser, to come on the land on which he had trespassed to remove an encroachment made thereon by him. 28 B. 20 (57). **U**

(29) **Mandatory injunction—Notice to defendant not to continue a building.**

Mere notice to the defendant, not to continue the erection of a building, which obstructs the plaintiff's ancient light, is not a ground for the granting of a mandatory injunction, when such notice is not followed by legal proceedings. 16 C. 252. **V**

(B)—RULES *re* GRANTING OF INJUNCTIONS.

(*a*)—**Grant of injunction in case of the invasion of the right to light and air.**

(1) **Obstruction to light and air—Mandatory injunction—Substantial loss of comfort to be proved.**

(*a*) Before granting a mandatory injunction for the removal of the obstruction to light and air, the Court must be satisfied that a substantial loss of comfort has been caused, and not a mere fanciful or visionary loss. 138 P.L.R. 1902. **W**

(*b*) Unless there is a substantial privation of light, sufficient to render the habitation of the house uncomfortable, or to prevent the plaintiff from carrying on his usual trade, as beneficially as before, no mandatory injunction for the removal of obstruction to ancient light and air or even damages will be awarded. P.J. (1891), 302. **X**

(*c*) A mandatory injunction for the removal of a wall, which obstructs the light and air to the plaintiff's house, will only be allowed, if the wall materially interferes with the comforts or convenience of the plaintiff, and if the plaintiff had protested against the new wall being built. 10 B.H.C. 95. **Y**

(*d*) To entitle the plaintiff to restrain the defendant from obstructing the access of light and air to the plaintiff's house, the obstruction must be such as to render the house unfit for the ordinary purposes of occupation or business, as the case may be. 14 C. 839. **Z**

(*e*) In order to give a right of action for obstruction of an ancient light, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises, as beneficially as he had formerly done. This rule of English Law has furnished the model to S. 33 of the Easements Act. 3 N.L.R. 114. **A**

(*f*) Thus where the building newly erected by the defendant was found to be such as to cause a substantial diminution of light and air to the plaintiff's premises, to such an extent as to prevent the plaintiffs from carrying on their usual jute business as beneficially as before, an injunction was granted for the removal of so much of the defendant's building as interfered with the plaintiff's right. 9 C.W.N. 543. **B**

(*g*) Thus, also, where the defendant's newly built wall reduced the plaintiff's light to such an extent as to render the plaintiff's house perfectly useless for the manufacture of a certain kind of cloth, which he was carrying on for more than 20 years, *held* that the plaintiff was entitled to an injunction. 19 A. 259=17 A.W.N. 43. **C**

1.—"injunction may be granted..(a) if the easement is..disturbed."—(Ctd.)

(B)—RULES *re* GRANTING OF INJUNCTIONS.—(*Continued*).

(a)—Grant of injunction in case of the invasion of the right to light and air.—(*Continued*).

(2) Warning given by plaintiff to defendant at an early stage to be considered in granting injunction.

(*a*) The granting of an injunction, to remove a building, which obstructs ancient light and air, will depend on the warning given by the plaintiff, to the defendant, at the early stage of the building operation, not to build, and on the injury being a material one, not capable of being adequately compensated by damages. P.J. (1882), 63. D

(*b*) Where the defendant, by building an upper storey to his house, obstructed the ancient light and air to the plaintiff's upper storey, *held* that the plaintiff was entitled to a mandatory injunction, he having served a notice to the defendant, at the commencement of his operation, not to interfere with his rights. 2 P.R. 1893. E

(*c*) Where, in spite of a notice, the defendant continued the building of his house, the Court granted a mandatory injunction directing the defendant to pull down so much of the building as caused injury to the plaintiff, as the injury caused was such that no pecuniary compensation could afford adequate relief. 2 B. 133. F

(3) Wilful obstruction to light and air—Ground for mandatory injunction.

Where any person, wilfully and intentionally, obstructs the ancient light and air, he is liable for the removal of the obstruction, and money damages will be no compensation. 4 W.R. 23. G

(4) Covenant for quiet enjoyment—Obstruction to light and air.

Where, by a deed of partition, the defendant expressly covenanted with the plaintiff, so far as his own acts were concerned, for quiet enjoyment, the Court would be justified, except under special circumstances, in compelling the defendant to perform his part of the contract, *viz.*, to abstain from erecting a building which would obstruct the plaintiff's light and air, without looking minutely into the nature and extent of the interference. 8 B.H.C. (O.C.), 181. H

(5) Complete blocking up of window—Ground for injunction.

Where the plaintiff's window was taken possession of by the defendant without leave or license, as completely as if he had blocked it up altogether, it was held that damages could not afford adequate relief and ought not to be substituted for an injunction against the plaintiff's will. In such a case, if the obstruction were a new one, plaintiff will also be entitled to the removal thereof. 8 B. 95. I

(6) Obstruction to light and air—Material injury to dominant tenant—Injunction.

On obstruction, by the servient owner, of the passage of light and air to the dominant tenement, resulting in serious interference with the comfort or enjoyment of the owners of, or causing material injury to, such tenement, it is competent for the Courts to interfere as well by mandatory, as by preventive, injunction, provided that, in the circumstances of the case, there be nothing inequitable in putting in force the former remedy. 8 B.H.C. (O.C.), 181. J

1.—"injunction may be granted..(a) if the easement is..disturbed."—(*Ctd.*)

(B)—RULES *re* GRANTING OF INJUNCTIONS.—(*Continued*).

(*a*)—Grant of injunction in case of the invasion of the right to light and air.—(*Continued*).

(7) Obstruction to light and air—extent of injunction.

In granting an injunction for obstruction of light and air, the Court should order the removal of so much only as prevents the access of sufficient light to the plaintiff's room through the window. 20 B. 788. **K**

(8) Obstruction to light and air—Injunction not granted where damages afford adequate relief.

It has been the settled practice of the Courts not to grant an injunction where damages afford adequate compensation. In the case of a material infringement of the plaintiff's right to light and air, the Court has, under the Specific Relief Act, a discretion to refuse an injunction, if the injury can be adequately compensated by damages. But, in exercising such discretion, the Court must consider all the circumstances of the case. 7 Bom. L.R. 352. **L**

(9) Suit for injunction—Damages may be given, if there be no substantial damage.

(*a*) Though the light and air to the plaintiff's house is sensibly diminished by the defendant's building, yet, if there is no such substantial damage by the building as would justify an injunction, the Court will not grant an injunction, but will award adequate damages, without referring the plaintiff to another suit therefor. 23 B. 786. **M**

(*b*) Where the obstruction caused to the plaintiff's ancient light did not cause very serious damage to plaintiff's house, nor render it uninhabitable, but merely made two rooms somewhat darker and hotter, thereby reducing the market value of the property, the Court refused to grant an injunction, but awarded damages for Rs. 7,000, calculating the loss of rent at about Rs. 20 a month. 20 B. 704. **N**

(*c*) Where the plaintiff's light and air has been sensibly diminished by the erection of a new building by the defendant, the Court refused to grant an injunction, in favour of the plaintiff, on the ground that there had not been such a large, material and substantial damage, as to require interference by injunction, and that the plaintiff's room had not been rendered unfit for the purpose, for which it might, reasonably, have been expected to be used. 18 B. 474. **O**

(10) Alteration of easement of light by erecting new windows.

Plaintiff, who had acquired an easement for light and air, through two windows of his house, rebuilt his house and opened two new windows on a higher level. Plaintiff would not be entitled to an injunction for the removal of the obstruction caused to the new windows, as the easement claimed in respect of the two new windows, which did not receive the same cones of light as was enjoyed through the old ones, was distinct from the easement in respect of the old windows. 26 B. 374. **P**

(11) Suit for injunction from erecting certain door—Door put up in the interval—Mandatory injunction—General prayer.

Plaintiff sued for restraining the defendants from erecting a certain door, and prayed in his plaint for such other relief as the Court may think fit. After the filing of the plaint but before the hearing of the suit, the defendant put up the door. *Held*, that, on the suit as framed, the

1.—"injunction may be granted..(a) if the easement is..disturbed."—(Ctd.)

(B)—RULES *re* GRANTING OF INJUNCTIONS.—(*Continued*).

(a)—Grant of injunction in case of the invasion of the right to light and air.—(*Concluded*).

Court could grant a mandatory injunction for the removal of the door, since it was the defendant's subsequent conduct, which rendered it necessary that the plaintiff should be given, as prayed for in his plaint, such other relief as the Court may think fit. 26 B. 136. Q

(12) Light at an angle of 45°, applicability of the rule.

(*a*) There is no rule of law as to light at an angle of 45°. But experience shows that it is, generally speaking, a fair working rule to consider that no substantial injury is done to a person's ancient light, when an angle of 45° is left to him; especially if there is good light left from other directions as well. 7 Bom. L.R. 352. Also 5 Bom. L.R. 446. R

(*b*) There is no rule of law, that ancient lights may be interfered with by a building, provided it leaves to such building an angle of 45° of light; but, in judging of the probable effect of a proposed building upon ancient lights, the Court may not unreasonably regard the fact, that where an angle of 45° is left, it is *prima facie* evidence, that there will be no substantial interference, and may require this presumption to be clearly rebutted by satisfactory evidence. 5 Bom. L.R. 446. S

(*c*) An easement of light to a window only gives a right to the removal of such portion of the building as prevents the access of sufficient light to the window. This is usually considered to be the light at an angle of 45°. 20 B. 788. See also 5 Bom. L.R. 446. T

(*d*) In cases of obstruction to light and air, the rule of 45° does not afford, in all cases, a correct measure of relief. The question to be determined in such cases is whether the obstruction causes such a privation of light or air to the house as renders the occupation of the house uncomfortable. 6 Bom. L.R. 633. U

(*e*) The 45° rule is not a positive rule of law; but it is a circumstance, which the Court may take into consideration, and is especially valuable when the proof of obstruction is not definite or satisfactory. But where lights are closed up by high buildings at the sides, the rule may not be applicable. 14 C. 839. V

(*f*) The mere fact that the defendant's new building left the plaintiff with less than 45° of light will not be sufficient reason for granting injunction. The plaintiff will be entitled to injunction, on proving that there was a diminution in the quantity of light and air, which had been used to enter the house during the whole of the prescriptive period, and if so, that the diminution was such as to render the plaintiff's house uncomfortable for the purposes of habitation. 29 B. 157. W

(b)—Obstruction to easements of right of way.

(1) Obstruction to right of way—Injunction.

(*a*) Where, under a deed of sale, the plaintiff had acquired, not a right in the soil of a passage, but only a right of way over it, *held* that the plaintiff was entitled to an injunction against the defendant for future obstruction to the right of way. 18 W.R. 379=9 B.L.R.O.C. 328. X

1.—"injunction may be granted..(a) if the easement is..disturbed."—(Ctd.)

(B)—RULES *re* GRANTING OF INJUNCTIONS.—(*Continued*).

(*b*)—Obstruction to easements of right of way.—(*Concluded*).

(*b*) Where a servient owner obstructs the right of way through a door-way, by means of a building, the dominant owner will be entitled to the removal of such parts of the structure as interfere with his right. P.J. (1893), 538. **Y**

(2) Change of use in a right of way—Injunction restraining such user.

Where the defendants had a right of way to their field, for agricultural purposes, through the adjoining field of the plaintiff, but having converted the field into a timber depot, continued to use the said way for purposes of the timber trade, it was held that the plaintiff was entitled to an injunction restraining the defendants from using the way otherwise than for agricultural purposes. 24 B. 188. **Z**

(3) Right of way on Railway level crossing—Obstruction—Injunction.

Where the defendants closed the gate-way at a level crossing of the railway, through which there was a public right of way, a person who had suffered special damage by the obstruction would also be entitled to an injunction. 10 B. 390. **A**

(4) Public way—Owner's right.

The owner of the soil, who dedicates a way to the public, parts with no other right than a right of passage, and the owner may exercise any right not inconsistent with the exercise of the right of way of the public. 31 C. 839 (846). **B**

(*c*)—Grant of injunctions in case of invasion of the right of privacy.

(1) Invasion of privacy—actionable according to usages of particular districts—Injunction.

In accordance with usages of particular districts, invasion of privacy is actionable. A person, whose right of privacy is invaded by opening new windows or making any new apertures or enlarging old ones, has a remedy at law by way of injunction. 5 B.H.C.R. (A.C.), 42. **C**

(2) Invasion of privacy, actionable in Guzerat.

In Guzerat, an invasion of privacy by opening new windows is actionable, and that right of action is not altered by the fact that a public road runs between the dominant and servient tenement. 6 B.H.C.R. 143. But see 18 M. 163. **D**

(3) In Madras invasion of privacy is not actionable.

A person, whose privacy is invaded, has it in his power to build on his ground so as to shut out the view from the window which overlooks the house. The invasion of privacy by opening new windows is not a wrong, in respect of which a suit for injunction is maintainable. 18 M. 163. But see 6 B.H.C.R. 143. **E**

(4) Invasion of privacy—Case before the Act—Injunction.

A suit to compel the defendants to close their windows in the newly built second storey, which overlooked the plaintiff's house, and invaded plaintiff's alleged right of privacy, could not be maintained. The right of privacy is not an inherent right of property. It can only exist by prescription, grant or express local usage. 14 W.R. 103. **F**

I.—"injunction may be granted..(a) if the easement is..disturbed."—(Ctd.)

(B)—RULES *re* GRANTING OF INJUNCTIONS.—(*Continued*).

(c)—Grant of injunctions in case of invasion of the right of privacy.—(*Concld.*)

(5) Injunction cannot be granted when privacy is not proved.

Where the usage, as to the right of privacy, is not proved, it is not competent for the plaintiff to seek an injunction restraining the defendant from opening any windows in his wall, on the ground, that the privacy of the plaintiff had been or would be interfered with. 5 C.W.N. 147. G

(6) Invasion of privacy—Form of decree.

(*a*) In a case of invasion of privacy, the decree to be given to the plaintiff should be one requiring the defendant to demolish any construction made by him, which interferes with the plaintiff's right of privacy, and restraining him from making any such construction in future. 1 A.L.J. 118. H

(*b*) Where a person makes a roof, which interferes with the privacy of his neighbour's house, the person making the roof cannot be ordered to erect a wall on the roof so as to prevent the view of the neighbour's house; because the object of a mandatory injunction is to restore things to their original conditions, not to create a new state of things. 1 A.L.J. 118. I

(d)—Easements of drainage, &c.

(1) Disturbance of an apparent and continuous enjoyment—Injunction.

Where the apparent and continuous easement to the discharge of water and drainage is disturbed, pecuniary compensation would not be an adequate relief, and an injunction would be necessary for the convenient enjoyment of the house. 49 P.R. 1900. J

(2) But removal of only so much as obstructs plaintiff's right must be ordered.

Where the defendant obstructs, by erecting a dam in a natural water-course, the drainage of surplus rain water of the plaintiff's land, the Court should see how far the erection of the dam will be an invasion of the plaintiff's right, and the removal of only so much of the dam, which obstructs the plaintiff's right, should be ordered. 12 C. 323. K

(3) Right to uninterrupted flow of water—Substantial injury must be caused before injunction can be granted.

In a suit to establish the plaintiff's right to an uninterrupted flow of water, the interference or obstruction, in order to warrant relief by way of injunction, must have caused substantial injury to the plaintiff. 5 M.H.C. 6. L

(4) Construction of embankment—Injunction.

(*a*) Where a person constructed certain embankments, which caused the natural drainage from certain adjoining lands deflect along the foot of the embankments, so as to increase the usual burden upon it and on the lower land, the owner of the lower land will be entitled to an injunction to compel the defendant to restore the original flow. 1 N.L.R. 182 (183). M

(*b*) A plaintiff will be entitled to an injunction to compel a defendant, who has raised an embankment to a greater height, on his proving not merely an injury actual or prospective, but an injury caused by infraction of some rights, which plaintiff possesses, or by the omission of something which the defendant is legally bound to do. 10 W.R. 435. N

I.—"injunction may be granted..(a) if the easement is..disturbed."—(Ctd.)

(B)—RULES *re* GRANTING OF INJUNCTIONS.—(*Continued*).

(*d*)—Easements of drainage, &c.—(*Continued*).

(5) **Prescriptive right to use water—injunction.**

Where the plaintiffs were, from time immemorial, irrigating their fields by using the water of a tank which had two openings, through one of which water flowed into, and through the other the water flowed out of, the tank, and the defendant closed up both the openings, *held* that the plaintiff was entitled to an injunction restraining the defendant from closing up either of the openings. 30 C. 281. **O**

(6) **Obstruction to easement of water—Dominant tenement in the hands of a tenant.**

The user, for 20 years, of the water of a tank for irrigating an adjacent land gives the owner of the land a right of easement, although the modes of drawing the water were different within that period; and the owner of the land is entitled to an injunction restraining the owner of the tank from obstructing him in the exercise of that right, even if the land be in the occupation of a tenant. 8 C.W.N. 158. **P**

(7) **Obstruction to the right of letting water from eaves.**

(*a*) Where, in obstruction of the right acquired by the plaintiff to have the water carried from his roof on to the defendant's roof, the latter raised the common wall and removed the plaintiff's eaves, it was held that relief should be granted to the plaintiff by damages or injunction. 16 B. 533 (535). **Q**

(*b*) Where the plaintiff had acquiesced, for a long period, though not for a period of 20 years, in the falling of water from the defendant's roof which projected over his land, *held*, that, although the defendant had not acquired an easement, the plaintiff, having acquiesced in it, would not be entitled to an injunction for the removal of the projection. P. J. (1888), 212. **R**

(8) **Injunction against a Railway Company from flooding plaintiff's land, nature of.**

Where the plaintiff sued for damages and for an injunction to restrain the defendant Railway Company from flooding his land, caused by the negligent manner in which the work of the Railway had been constructed and maintained, *held* that the injunction to be granted should be general in its terms, restraining the defendants from flooding the lands of the plaintiff and not for the construction of any specified works which the Court has no power to supervise. 7 C.W.N. 393 (399) **(P.C.)** =27 B. 344. **S**

(9) **Customary easements—Right to build dam—Injunction for its removal.**

A customary easement to put a dam across a stream not being unreasonable, a person who has acquired such a right cannot be asked to remove the dam, on the ground that such dam had the effect of diverting water from a tank on which the plaintiff depends for irrigation. 18 M. 320. **T**

(10) **Injunction to close a new channel constructed by Government.**

In a suit brought to obtain an injunction to close a new channel made by the Superintending Engineer, the second defendant, for the supply of water to the village of the first defendant, the Court held that the plaintiff was not entitled to the injunction prayed for, on the grounds, that no right of the plaintiff had been invaded, that no damage had accrued and that no case of prospective damage had been made out. 7 M.H.C. 60. **U**

1.—"Injunction may be granted..(a) if the easement is..disturbed."—(Ctd.)

(B)—RULES *re* GRANTING OF INJUNCTIONS.—(*Continued*).

(*d*)—Easements of drainage, &c.—(*Concluded*).

(11) **Alteration in passage of water by construction of new channel and collection of water.**

Where the effect of a new channel, made by the defendant, was to collect the water, which formerly flowed indefinitely, into a definite channel, and to throw it all into a particular part of the plaintiff's channel, the plaintiff was entitled to an injunction to restrain the defendant from making or using the said channel. 28 M. 15 (16). **Y**

(12) **Obstruction to right of fishing in the sea.**

It is competent for a Court, within whose local jurisdiction, the defendants reside, to restrain them from causing the alleged illegal disturbance of plaintiff's right to fish and to use fishing stakes fixed in the sea below low water-mark. 2 B. 19. **W**

(13) **Penetration of trees on neighbour's wall—Permanent injunction.**

A perpetual injunction restraining the defendants from planting trees, that are likely to penetrate into the foundation of plaintiff's building and wall will be unworkable. 31 C. 944=8 C.W.N. 710. **X**

(14) **Right to hold "hat" or "market."**

There is no legal objection to the holding by any person of a "hat" or market whenever and wherever he may please, provided, that he does so, on his own land, and in such a way, as not to be a nuisance to neighbouring landholders who have equal rights with him. A.W.N. (1907), 248. **Y**

(C)—JURISDICTION AND ENFORCEABILITY OF INJUNCTION DECREES.

(1) **Disobedience of injunction—Remedy is committal for contempt of Court.**

(*a*) The proper remedy for disobedience of an injunction passed by a Civil Court is committal for contempt, not a conviction under S. 188 of the Penal Code. 6 C. 445=7 C.L.R. 350. **Z**

(*b*) When a Court issues an order to a party in a suit for abstention from any particular act, and when the person to whom the order has been issued disobeys, he is guilty of contempt of Court, and the Court can take proceedings to enforce its authority, notwithstanding anything contained in Art. 179 of the Limitation Act, 1877. 23 A. 465. **A**

(2) **Non-compliance with a mandatory injunction—Damages cannot be awarded—Remedy lies in execution.**

A suit does not lie for damages for non-compliance with a mandatory injunction, to compel the performance of which, the plaintiff had his remedy in execution. 13 A. 98. **B**

(3) **Appointment of Commissioner to decide extent to which building is to be demolished—Practice.**

(*a*) The High Court, in granting a mandatory injunction to ancient lights, provided for the appointment of a Commissioner by the District Court to decide the extent to which the defendant's building should be removed or altered so as to give effect to the injunction. 29 B. 157 (161). **C**

***l.*—"*injunction may be granted..(a) if the easement is..disturbed.*"—(*Ctd.*)**

(C)—JURISDICTION AND ENFORCEABILITY OF INJUNCTION DECREES.—(*Continued.*)

(*b*) In executing the decree for a mandatory injunction for the demolition of so much of the house as obstructed the ancient light of the plaintiff, the High Court directed the executing Court to employ a professional man, agreed on by the parties, if they could so agree, but if not, one nominated by itself, to determine what demolition would be necessary to give effect to the decree in the way least injurious to the defendant. 2 B. 133 (139). **D**

(4) **Infringement of an injunction—Attachment—Court not bound by surveyor's opinion.**

On an infringement of an injunction restraining a person from interrupting the access of light and air to certain windows, an attachment will issue, even though the defendant has taken the advice of a surveyor and legal advisor in constructing the building complained of as a breach of injunction. The Court will not be bound by the opinion of the surveyors, but will form its own judgment as to the effect of the structure complained of. 1 B.H.C. (O.C.), 148. **E**

(5) **Disobedience to injunction issued by a District Court—Power of District Court.**

A District Court is not a Court of record, and a Court, which is not a Court of record, has no inherent power to commit for contempt. But, under S. 493 of the Civ. Pro. Code, the Court may, in case of disobedience, enforce an injunction by attachment of the property, or by imprisonment, of the party disobeying, and this power is exercisable only when the Court is set in motion by a party, who deems himself aggrieved. 26 M. 494 (495). **F**

(6) **Enforcing an injunction against the heir of a deceased defendant.**

Having regard to the provisions of S. 234 of the Civ. Pro. Code, an injunction restraining the defendant from obstructing light and air might be enforced after his death, against his son as his legal representative. 26 B. 283. **G**

(7) **Mamlatdar had no jurisdiction to determine what amount of water each of two riparian proprietors can take from a stream.**

The Mamlatdar has no jurisdiction, under the Mamlatdars' Courts Act, to determine nice questions which may arise between riparian proprietors as to the amount of water each can take from a stream. 23 B. 47 (50). **H**

(8) **In 23 B. 506, held, that Mamlatdar had jurisdiction to inquire whether a diversion of water was unreasonable.**

What would constitute an unreasonable diversion of the water, such as to disturb the use of the lower riparian owner, would be a question of fact for the decision of the Mamlatdar according to the circumstances of the case. The question might be a difficult one depending on the due apportionment of the water; but we think it is one which the Legislature has given the Mamlatdar jurisdiction to decide, thinking possibly that for water disputes a speedier remedy than the ordinary Courts can afford is often desirable in the interests of agriculture and for the preservation of the peace. The party dissatisfied with the decision can seek redress by a regular suit in the Civil Court. 23 B. 506 (509) (per Curiam, J.) **I**

I.—"injunction may be granted..(a) if the easement is..disturbed."—(Ctd.)

(C)—JURISDICTION AND ENFORCEABILITY OF INJUNCTION DECREES.—(*Continued*).

(9) **The apparent inconsistency between 23 B. 47 and 23 B. 506 explained by Full Bench in 25 B. 395.**

The Mamlatdar's Court makes a distinction between actual possession which is disturbed, and rights claimed as easements without actual possession. The latter clause of rights, excepting a right of way to fields, does not come within the jurisdiction of the Mamlatdar's Court. If the use of water is disturbed or obstructed, the Mamlatdar has jurisdiction to restore possession. 25 B. 395 (406)—per Ranade, J. (F.B.) **J**

(10) **Mamlatdar has jurisdiction where the plaintiff was in possession but dispossessed.**

But a Mamlatdar has jurisdiction to hear a suit and grant an injunction when a riparian owner has been dispossessed of the use of water of which he was in possession within six months before suit. 23 B. 47. **K**

(11) **Suit against the Government officers—Mamlatdar's jurisdiction.**

A Mamlatdar's Court has jurisdiction, under Bombay Act III of 1876, to hear and determine suits brought against officers of Government for acts purporting to have been done by them in their official capacity. An injunction may be granted, against the Irrigation Officer, for damming a stream on proof that disturbance to plaintiff's right was within six months before suit, although the stream derives its supply of water by leakage from an irrigation channel. 23 B. 761. **L**

(12) **Mamlatdar's jurisdiction—Nature of injunction.**

The Mamlatdar's jurisdiction cannot be limited by the form of the injunction provided by Sch. (c) of Act III of 1876. S. 5 of the Act states the nature of the injunction to be granted. So a person, who obstructs a use of water by the lower riparian owner, by erecting a dam in his portion, may be refrained from building the dam by an injunction. 25 B. 395. **M**

(13) **Mamlatdar's jurisdiction to supervise the execution of his decree.**

Under S. 17 of the Mamlatdar's Act (III of 1876), a Mamlatdar is not precluded from himself supervising the execution of a decree for the removal of a drain in a case in which he thinks the village officers are, from interest or otherwise, unlikely to give proper effect to it. 19 B. 675. **N**

(14) **Order of Magistrate under S. 145 of the Crim. Pro. Code—Subsequent suit in a Mamlatdar's Court.**

A finding by a Magistrate under S. 145 of the Crim. Pro. Code (Act V of 1898), as to the fact of actual possession at the date of the preliminary order, is not conclusive as to the possession for a period of two months prior to that date and, therefore, a Mamlatdar is not precluded from enquiring into the matter in a suit duly instituted under the Mamlatdars' Courts Act. 26 B. 353. **O**

(15) **Mamlatdar's decision—Subsequent suit under S. 9 of the Specific Relief Act not barred.**

The decision of the Mamlatdar, under Bombay Act III of 1876, is not a bar to a suit for possession in the Civil Court under S. 9 of the Specific Relief Act. 24 B. 251. **P**

1.—"injunction may be granted..(a) if the easement is..disturbed."—(Cld.)

(C)—JURISDICTION AND ENFORCEABILITY OF INJUNCTION DECREES —(*Concluded*).

(16) **Right of ferry—S. 145, Crim. Pro. Code.**

The right to ferry, that is the right to carry passengers to and fro, cannot be treated apart from the possession of the lands used on either side of the stream for the purpose of landing them. Where the subject-matter is the ferry, including the land and water upon which the right is exercised, the case comes under S. 145 of the Crim. Pro. Code. 26 C. 188. Q

2.—(b) "if the disturbance is only threatened or intended, &c."

(1) **Threatened damage to an easement—Whether damages awardable—English and Indian Law.**

According to English Law, it is an open question, whether damages, in lieu of injunction, can be awarded by way of compensation, for an injury not yet committed, but only threatened or intended. (Martin v. Price, L. R. (1894) 1 Ch. 276).

But S. 33 of the Easements Act lays down for India the law as to the cases in which damages or compensation may be awarded for threatened injury, and sets question at rest. 18 B. 474. R

(2) **Threatened injury to an easement—Whether damages awardable.**

In a Bombay case, not governed by this Act, the Court awarded damages, in lieu of injunction, for a threatened injury to plaintiff's ancient light, as the Court was of opinion, that the threatened diminution of light would be sufficiently compensated by damages, and that the plaintiff's comfort would not be materially affected by the defendant's new building. 13 B. 252. S

(3) **Threatened injury—when gives rise to a right to obtain an injunction.**

(*a*) Where the threatened act of the defendant is of such a character that it must inevitably result in injury to the plaintiff, the latter will be entitled to an injunction restraining the former from doing such an act, even though no actual damage has accrued. If, after commencement of the action, the damages accrued, the plaintiff may be allowed to amend the plaint by stating, the nature and extent of the injury. 24 C. 260. T

(*b*) Plaintiff's sustaining actual damage is not necessary before an injunction can be granted. It is enough, if the plaintiff shows, that the acts of the defendant are likely to cause substantial damage to the plaintiff, and that, in similar instances, substantial damage has been caused by similar acts. A.W.N. (1904), 101. U

(*c*) To entitle a party to an injunction, he must prove either damage or apprehended damage of such a character as to afford ground for an injunction. Apprehended damage must, to form the ground for an injunction, involve imminent danger of a substantial kind or injury that will be irreparable. 6 Bom. L.R. 123. V

(*d*) Injunction might be granted, not merely when an injury had actually taken place, but also when it has been threatened. 31 C. 944 = 8 C.W.N. 710. W

2.—(*b*) ***"if the disturbance is only threatened or intended, &c."***—(*Concld.*)

(*e*) Unless there will be a substantial interference with light and air, such as would reasonably interfere with the convenience and comfortable habitation of the house, and which will amount to a nuisance, a person will not be entitled to an injunction, restraining the defendant from erecting a new building. 8 O.C. 356. **X**

(4) *Qua timet* **action, necessary ingredients for.**

There are two necessary ingredients for a *qua timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will be very substantial or irreparable. 9 Bom. L.R. 912. **Y**

Abatement of obstruction of easement.

36. Notwithstanding the provisions of section 24, the dominant owner cannot himself abate a wrongful obstruction (1) of an easement.

(Notes).

1.—"dominant owner cannot himself abate a wrongful obstruction."

(1) Obstruction by a person not the owner of servient tenement—Right of abatement.

Where the plaintiff, who was found to be the owner of the soil of a lane over which he as well as the defendant had a right of way, erected a wall so as to exclude the defendant from the lane, *held*, that the defendant had the right to pull down the wall so erected. 7 C. 665. **Z**

(2) Abatement of a private nuisance, legality of.

Abating a private nuisance without violence and real danger of any breach of the peace is not illegal. 3 C. 573=1 C.L.R. 352. See also 2 C.L.R. 62. **A**

CHAPTER V.

THE EXTINCTION, SUSPENSION, AND REVIVAL OF EASEMENTS.

Extinction (1) by dissolution of right of servient owner.

37. When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

Exception.—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section 10.

Illustrations.

(*a*) A transfers Sultanpur to B on condition that he does not marry C. B imposes an easement on Sultanpur. Then B marries C. B's interest in Sultanpur ends, and with it the easement is extinguished.

(*b*) A, in 1860, let Sultanpur to B for thirty years from the date of the lease. B, in 1861, imposes an easement on the land in favour of C, who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years. B's interest in Sultanpur then ends, and with it C's easement.

(*c*) A and B, tenants of C, have permanent transferable interests in their respective holdings. A imposes on his holding an easement to draw water from a tank for the purpose of irrigating B's land. B enjoys the easement for twenty years. Then A's rent falls into arrear, and his interest is sold. B's easement is extinguished.

(*d*) A mortgages Sultanpur to B, and lawfully imposes an easement on the land in favour of C in accordance with the provisions of section 10. The land is sold to D in satisfaction of the mortgage-debt. The easement is not thereby extinguished.

(Notes).

1.—"Extinction."

"(1) **Extinction of easement by acquisition of land under Land Acquisition Act.**

(*a*) Where Government acquires land under Act VI of 1857 (Land Acquisition), the land vests absolutely in the Government, under S. 8, discharged of any right of way previously enjoyed by the public over that land. 6 B.L.R. (Ap.), 47. **B**

(*b*) Where a Railway Company acquired land with the aid of Government under Act VI of 1857 (Land Acquisition), all rights previously existing, whether of passage or of any other kind, absolutely ceases upon the acquisition of the land for the Railway. 3 W.R. 27. **C**

(*c*) It is clear, from the provisions of S. 8 of Act VI of 1857 (Land Acquisition), that the title of Government to the land acquired for public purposes is absolute, and, therefore, the public have no right of way over it. 14 W.R. (Cr.), 72. **D**

"(2) **Acquisition under Act X of 1870—Extinction of easements—Compensation for extinguished easements.**

Land, taken under Act X of 1870 (Land Acquisition Act), is taken discharged of all easements; and the loss of easements must be taken into account in assessing the compensation. 14 C. 423. **E**

Extinction by release.

38. An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

Explanation I.—An easement is impliedly released—

(*a*) where the dominant owner expressly authorizes an act of a permanent nature to be done on the servient heritage (1), the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority;

(*b*) where any permanent alteration is made in the dominant heritage (2) of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

Explanation II.—Mere non-user of an easement is not an implied release (3) within the meaning of this section.

Illustrations.

(*a*) A, B, and C are co-owners of a house to which an easement is annexed. A, without the consent of B and C, releases the easement. This release is effectual only as against A and his legal representative.

(*b*) A grants B an easement over A's land for the beneficial enjoyment of his house. B assigns the house to C. B then purports to release the easement. The release is ineffectual.

(*c*) A, having the right to discharge his eaves-droppings into B's yard, expressly authorizes B to build over this yard to a height which will interfere with the discharge. B builds accordingly. A's easement is extinguished to the extent of the interference.

(*d*) A, having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(*e*) A, having a projecting roof by means of which he enjoys an easement to discharge eaves-droppings on B's land, permanently alters the roof, so as to direct the rain-water into a different channel, and discharge it on C's land. The easement is impliedly released.

(Notes).

Ex. 1.—(a) "Easement is impliedly released....where dominant owner expressly authorizes act on servient heritage."

(1) Discontinuance of drain—Servient owner filling it up—Effect.

Where the dominant owner discontinued the use of a drain, which existed under both the servient and dominant tenements, and the servient owner, consequently, incurred expenses in altering and filling up the drain, *held* that the easement should be considered as extinguished. 97 P.R. 1869. F

(2) Allowing a water-way to be filled and using a new one—Effect.

Where a person, having a right of way over water, allows it to be filled up without obstruction, and consents to the digging of another water-way, and actually uses the new way, he may be held to have abandoned his right of way over the old water-course. 12 W.R. 519. G

2.—"An easement is impliedly released..where any permanent alteration is made in the dominant heritage."

(1) Erection of new windows for old ones—Easement of light how affected.

In an easement of light, the burden of the servient heritage consists in the obligation to allow the particular rays, in respect of which the easement has been acquired, to pass unobstructed. When the position of the window has been changed, the question is whether it is the same ray which enters by the new window as previously entered through the old window. If the position of the new window is such, that the rays passing through it would not have passed through the old window, then no easement exists to secure a free passage for such rays. 26 B. 374=4 Bom. L.R. 34 (37). H

(2) New house erected on the site of old house—Easement of light and air, how affected.

The mere fact of a house having been taken down, or having fallen down, and a new house being erected on its site would not, by itself, be sufficient to extinguish any right to light and air, which the owner of the house may possess. The question, whether the right is, or is not, extinguished, would depend upon, whether the new doors and windows are in the same position and are of the same dimensions as the old doors and windows. 3 C.W.N. 28. I

2.—"An easement is impliedly released..where any permanent alteration is made in the dominant heritage."—(*Concluded*).

(3) **Substitution of new way for old one—Intention to release.**

Where a new way is substituted for an old way, with the consent of the person entitled, and the non-user of the original way is accompanied by acts, which warrant the Court in inferring an intention to release, the right of resumption of the old way is lost, and the non-user need not extend over any defined period. 20 W.R. 188. J

"Ex. II—Mere non-user of an easement is not an implied release."

(1) **Mere non-user of easement does not amount to abandonment, unless there be an intention to do so.**

(*a*) Mere cessation of enjoyment of an easement does not necessarily extinguish the right. If that is coupled with any act or omission on the part of the owner of the dominant tenement, indicative of an intention to abandon the right, the easement will be released. 30 P.R. 1871. K

(*b*) Mere non-user of an easement by the dominant owner, owing to the dismantled condition of his house, cannot be evidence of his abandonment of easement. Over and above such non-user, there must be evidence of an intention on his part to abandon the easement. 38 P.R. 1886. L

(*c*) The mere non-user of a mode of easement cannot deprive a person of his right to enjoy the easement in the particular mode, unless there was any intentional abandonment of that particular mode, giving rise to an agreement, express or implied, between the parties, by which the person can be said to have relinquished it. 6 Bom. L.R. 287. M

(2) **But non-user of an easement may give rise to inference of abandonment.**

It may be that, in some instances, from a long disuse of an easement, abandonment thereof may be inferred; but a mere disuse of an easement for four or five years may not be sufficient to constitute an abandonment. 16 W.R. 277 (278). N

(3) **In one case six years' non-user was held to amount to an abandonment.**

A right of way should be kept by constant use; and a discontinuance of the right, for the space of six years, was held to have extinguished that right. 14 W.R. 79 = 5 B.L.R.A.P. 66. O

(4) **In another case three years' non-user, coupled with other circumstances was held to amount to abandonment.**

Interruption of the use of a drain for three years, coupled with other circumstances indicating intention, may extinguish the easement. 30 P.R. 1871. P

(5) **Abandonment—Meaning of.**

The word "abandonment," as applied to easements, means, generally, the voluntary and permanent relinquishment by the dominant owner, of a right, which he has actually acquired. 1 C. 422 = 25 W.R. 228. Q

(6) **Abandonment of an easement—effect.**

An abandonment of easement could not be, probably, materially operative, unless, something has been done by the servient owner, on the faith of such abandonment, which should make it a cause of estoppel against the dominant owner. 1 C. 422 (426) = 25 W.R. 228. R

"*Ex. II.—Mere non-user of an easement is not an implied release.*"—(*Cld.*)

(7) **Relinquishment of all interests on the land exchanged—Right of way, how affected.**

The relinquishment of all rights and interest in land exchanged does not necessarily involve loss of right of way over the land. 4 W.R. 83. S

(8) **Evidence of relinquishment must be clear.**

The evidence as to relinquishment must be clear and unequivocal. 6 Bom. L.R. 287. T

Extinction by revocation.

39. An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.

Extinction on expiration of limited period or happening of dissolving condition.

40. An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled.

Extinction on termination of necessity.

41. An easement of necessity is extinguished when the necessity comes to an end.

Illustration.

A grants B a field inaccessible except by passing over A's adjoining land. B afterwards purchases a part of that land over which he can pass to his field. The right of way over A's land which B had acquired is extinguished.

Extinction of useless easement.

42. An easement is extinguished when it becomes incapable of being at any time, and under any circumstances, beneficial to the dominant owner.

Extinction by permanent change in dominant heritage.

43. Where, by any permanent change in the dominant heritage (1), the burden on the servient heritage is materially increased, and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless—

(*a*) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used; or

(*b*) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it; or

(*c*) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

(Notes).

1.—"*permanent change in the dominant heritage.*"

(1) **New house erected on the site of an old house—Whether easement of light and air extinguished.** See 3 C.W.N. 28 under S. 38, *supra*.

1.—"permanent change in the dominant heritage."—(Concluded).

(2) **Easement of light—Change in the dominant tenement.** See 26 B. 374=4 Bom. L.R. 34 under S. 38, *supra.*

(3) **Light to new window—Right of servient owner to obstruct.**

If a man has a right to light from a certain window and opens a new window, the owner of an adjoining house has a right to obstruct the light to the new opening, if he can do so without obstructing the light to the old window. But if he cannot obstruct the new without obstructing the old, he must submit to the burden. 7 C. 453 (458). U

Extinction on permanent alteration of servient heritage by superior force.

44. An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement:

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage, and the provisions of section 14 apply to such way.

Illustrations.

(*a*) A grants to B, as the owner of a certain house, a right to fish in a river running through A's land. The river changes its course permanently, and runs through C's land. B's easement is extinguished.

(*b*) Access to a path over which A has a right of way is permanently cut off by an earthquake. A's right is extinguished.

Extinction by destruction of either heritage.

45. An easement is extinguished when either the dominant or the servient heritage is completely destroyed (1).

Illustration.

A has a right of way over a road running along the foot of a sea-cliff. The road is washed away by a permanent encroachment of the sea. A's easement is extinguished.

(Notes).

1.—"Easement is extinguished when.... heritage is completely destroyed."

(1) **Nature of destruction necessary for extinction of easement.**

The illustrations to this section and S. 51 make it clear that the destruction contemplated in this section must be permanent and not merely rebuilding. 7 Bom. L.R. 352 (356). V

(2) **Demolition of old building for erection of new building—Effect—Law before and after Easements Act.**

Before the Easements Act the law was that the demolition of a building, which had acquired a right to light and air, did not extinguish that right, if such demolition was for the purpose of new building having the same area of light and air included in the latter as had been possessed by the former. The Easement Act has not changed the law. 7 Bom. L.R. 352 (356). W

1.—"Easement is extinguished when....heritage is completely destroyed."—(Concluded).

(3) **Building a new house on the site of the old house—Prescriptive right is extinguished.**

Where the plaintiff builds a new house upon the site of the old house, his prescriptive right of easement, if any, is also extinguished. 20 W.R. 185. X

(4) **Partial destruction—effect on easement.**

There is nothing in this Act to support the contention that where a right to light and air to a building has been acquired, a partial destruction of it extinguishes that right. 7 Bom. L.R. 352 (356). Y

46. An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole [1] of the dominant and servient heritages.

Extinction by unity of ownership.

Illustrations.

(*a*) A, as the owner of a house, has a right of way over B's field. A mortgages his house, and B mortgages his field, to C. Then C forecloses both mortgages, and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(*b*) The dominant owner acquires only part of the servient heritage: the easement is not extinguished, except in the case illustrated in section 41.

(*c*) The servient owner acquires the dominant heritage in connection with a third person: the easement is not extinguished.

(*d*) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages: the easements are not extinguished.

(*e*) The joint owners of the dominant heritage jointly acquire the servient heritage: the easement is extinguished.

(*f*) A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires only one of the servient heritages. The easement is not extinguished.

(*g*) A has a right of way over B's road. B dedicates the road to the public. A's right of way is not extinguished.

(Notes).

1.—"same person becomes entitled to the absolute ownership of the whole of....heritages...."

(1) **Ownership to extinguish easement must be absolute.**

Absolute ownership does, but a qualified ownership does not, extinguish a right of easement. The mere circumstance of one becoming a joint co-sharer, after a right of easement has been acquired, does not extinguish the right. 7 A.W.N. 260. Z

(2) **Also ownership must be of the whole of the heritages—Co-ownership will not extinguish easement.**

When the dominant owner becomes a co-owner of the servient tenement jointly with another, the dominant owner has not such an estate in the servient tenement as to constitute unity of title in him to the two tenements, and the existing easements are not extinguished. 15 B.L.R. 361. A

(3) **Right of ownership and right of easement, incompatible.**

A right of ownership and a right of easement are incompatible. 3 A.W.N. 66. B

Extinction by non-enjoyment.

47. A continuous easement is extinguished when it totally ceases to be enjoyed [1] as such for an unbroken period of twenty years[2].

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner:

Provided that, if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877, a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section—

(*a*) where the cessation is in pursuance of a contract between the dominant and servient owners;

(*b*) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period, or

(*c*) where the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

Illustration.

A has, as annexed to his house, rights of way from the high road thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire, A exercises his right of way over X. His rights of way over Y and Z are not extinguished.

(Notes).

1.—"when it totally ceases to be enjoyed."

(1) **Destruction of easement by long non-user—Right to erect bund.**

The right to erect a bund across a river could only be enjoyed as an easement, and a person will lose that right by long desuetude; the public meanwhile may acquire a prescriptive right of way through the river. 32 C. 980. C

(2) **Right of way—Silent allowance of obstruction—Implied acquiescence.**

Where the plaintiff, who had a right of way over the defendant's land, allowed the defendant to proceed with the erection of a house, on that way, without interruption, and remained silent for seven years before he brought his suit, the plaintiff's conduct was such, that the Court should infer from it that the defendant had the acquiescence of the plaintiff. 10 W.R. 316. D

2.—"for an unbroken period of twenty years."

(1) **Discontinuance for four years—Effect.**

The plaintiffs sued for an injunction to restrain the defendants from allowing the rain-water of their house to flow on plaintiff's land. The Court dismissed the suit on the ground that the defendants' easement being discontinued only four years before suit, was not extinguished under S. 47 of the Indian Easement Act until the lapse of 20 years from its total disuse. 9 Bom. L.R. 1101. E

(2) **An ousted dominant owner may sometimes be barred by the Limitation Act from claiming his right by suit.**

(*a*) A right to easement is an interest in immoveable property. A suit to recover such a right will be governed by Art. 144 of the Limitation Act, 1877. 5 M. 253. F

(*b*) A suit to recover a jalkar (a profit a prendré) is governed by Art. 144 of the Limitation Act of 1877. 3 C. 276=1 C.L.R. 592. G

(*c*) The plaintiff's right to the flow of water from a canal is an interest in immoveable property, and he will lose all his remedy in respect to such interest by cesser of enjoyment for a period of more than 12 years before suit. 3 M.H.C. 111 (112). H

(3) **Private right of fishery—whether immoveable property under S. 9 of the Specific Relief Act.**

See 12 B. 221, 18 C. 80, 19 C. 544 and 13 M. 54 under S. 32, *supra*.

Extinction of accessory rights.

48. When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

Illustration.

A has an easement to draw water from B's well. As accessory thereto, he has a right of way over B's land to and from the well. The easement to draw water is extinguished under section 47. The right of way is also extinguished.

Suspension of easement.

49. An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

Servient owner not entitled to require continuance.

50. The servient owner has no right to require that an easement be continued [1]; and, notwithstanding the provisions of section 26, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

Compensation for damage caused by extinguishment.

Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

Illustration.

A, in exercise of an easement, diverts to his canal the water of B's stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. A then abandons his easement, and restores the stream to its ancient course. B's land is consequently flooded. B sues A for compensation for the damage caused by the flooding. It is proved that A gave B a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable B, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

(Notes).

1.—" servient owner has no right to require..that easement be continued."

(1) Dominant owner's right to put an end to an easement.

Where the dominant owner had, for a long period of time, been enjoying the right of water in excess of his requirements through the servient estate, the servient owner has no right to force the former to continue to exercise that servitude, and the dominant owner can put an end to the servitude whenever he may think proper. 2 C.L.R. 141. I

(2) Thus right to discharge water over another's land may be abandoned.

(*a*) Where an easement consists in the right to discharge water over the land of another, though the water may be advantageous to the servient tenement, the servient owner cannot acquire a right to have it discharged on his land, unless the existence of some grant or arrangement is either proved or, from the circumstances of the case, may be reasonably presumed. 14 C.P.L.R. 145. J

(*b*) The fact, that water falling on the plaintiff's land was collected in a reservoir and used to flow to the defendant's land, would not prevent the plaintiff from building, on his own land, a bund which would prevent the water from flowing on to the defendant's land. 13 W.R. 414. K

Revival of easements.

51. An easement extinguished under section 45 revives (*a*) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion; (*b*) when the destroyed heritage is a servient building, and, before twenty years have expired, such building is rebuilt upon the same site; and (*c*) when the destroyed heritage is a dominant building [1], and before twenty years have expired, such building is rebuilt upon the same site [2], and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under section 46 revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section 47.

Illustration.

A, as the absolute owner of field Y, has a right of way thither over B's field Z. A obtains from B a lease of Z for twenty years. The easement is suspended so long as A remains lessee of Z. But, when A assigns the lease to C, or surrenders it to B, the right of way revives.

(Notes).

1.—"such building."

(1) "Such building," significance of.

The term "such building" cannot be construed so as to mean "a building of the same dimensions" as the old building. The term means only "the destroyed dominant building." A dominant owner is, therefore, entitled to pull down the dominant building and rebuild it so as to preserve his easements, provided, the rebuilding does not impose a greater burden on the servient heritage. 7 Bom. L.R. 352 (358). L.

2.—"same site."

(1) New building erected partly on old site and partly on new—Effect.

Where a building is erected partly on the site of the old and partly on additional site, the building must be considered as one on the same site and is entitled to the old easement provided there is no increased burden on the servient tenement. 7 Bom. L.R. 352 (358). M.

CHAPTER VI.

LICENSES.

"License" defined.

52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

(Notes).

1.—"License."

(1) **License and easement distinguished.**

A license is not, as in the case of easements, connected with the ownership of any property, but creates only a personal right or obligation. License rights are not generally transferable, and the transferee of the rights of the licensor is not bound to continue the license granted by the former owner, while easements once established follow the property. 23 B. 397. **N**

(2) **License and interest in immoveable property distinguished.**

If the authority gave only a right to dig for tin or other metals, and remove the ore so dug out, it was of the nature of license ; but if the grant demised all the ores existing in a particular area, then it was a demise of interest in land. 23 B. 397 (402). **O**

(3) **Proof of license.**

The negative definition of license given in this section makes it necessary that, before a right can be shown to be a mere license only, it must be proved not to be an easement or an interest in property. 23 B. 397 (400). **P**

(4) **Right to raise rice plants in defendants' land and transplant them to the plaintiff's land, whether license.**

Where a right is conferred upon the plaintiff, to use the defendant's land, for a certain part of the year, for raising rice plants for the purpose of transplanting them to his own land, and such right has been enjoyed for 50 or 60 years, such a right cannot be considered as a personal license revocable at the grantor's pleasure. It is an easement, or more correctly, a permanent lease of the land, for a portion of the year, for a specific purpose. 23 B. 397 (402). **Q**

(5) *Kumki* **rights in South Canara—License.**

Kumki right in South Canara is not an easement, but a right exercised over Government waste, by permission of Government, and does not entitle the owners of the right to a decree for possession. 16 M. 304. **R**

(6) **Right to trap and carry away elephants, whether license.**

The grant of a right to trap elephants upon the plaintiff's land is a grant of a mere license, and, if the right is coupled with the right to carry away the elephants and reduce them to possession, the grant cannot be something more than a license, as such a right is not an interest in immoveable property nor an easement. 16 M. 280 (282) = 3 M.L.J. 27. **S**

(7) **Right of way by sufferance.**

A right of way by sufferance cannot create a permanent right. W. R. (1864), 293. **T**

(8) **Permission to tenant to erect a dam whether license.**

(*a*) Where a landlord granted permission to a tenant, to erect a dam, which had the effect of obstructing the natural flow of water to the other lands of the lessor, the permission did not amount to a grant, and might be terminated by the lessor on condition of paying the lessee any expenses which he might have ncurred. 1 M.H.C. 258. **U**

1.—"License."—(Concluded).

(*b*) An agreement, between two persons, to construct a dam across a main channel, and from thence, a smaller channel was to be made, through the land of one of them, to that of the other, by means of which, it was agreed that the latter should be at liberty to take water for the irrigation of his fields, was held to be an easement, and not merely a license revocable at the will of the grantor. 4 M.H.C. 98. **Y**

(9) **No right by prescription by tenant against landlord.**

A tenant cannot acquire a right by prescription against his landlord. 6 C.L.J. 218. **W**

(10) **Customary rights of tenants of a locality, nature of.**

A customary right of the tenants in the locality to cut wood for fuel, plough-handles, door-posts, &c., is a right of customary easement attaching to the locality, and not to any collection of individuals; such a right is known in this country, in the case of free pasturage or a fishery, what in English Law is called a *profit a prendre*. It is only under quantitative limitation as to present needs that such a customary right can be reasonably exercised. 6 C.L.J. 218. **X**

(11) **The granting of a right to use privy along with transfer of land, whether license.**

Where a person alienates a part of his land, and grants a privilege to the use of a privy over the other part, by the same instrument which transfers the land, the privilege must be regarded as one ancillary to the use of land and cannot be regarded as a mere license. 18 B. 382 (386). **Y**

Who may grant license.

53. A license may be granted by any one (1) in the circumstances, and to the extent, in and to which he may transfer his interests in the property affected by the license.

(Note).

1.—"license may be granted by any one, &c."

Power of tenants-in-common to grant license.

One of two or more tenants-in-common, may lawfully enjoy the whole property, in any way, not destructive of its substance so as to amount to an ouster of the other co-tenants. Whatever a tenant may himself do, he may license another to do. 7 B. 336 (337). **Z**

Grant may be express or implied.

54. The grant of a license (1) may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose may operate to create a license.

(Note).

1.—"grant of license."

Grant of license by parol or deed—Effect.

A mere license passes no interest, nor alters, nor transfers, property in anything, but merely makes an act lawful, which, without it, had been unlawful, and this is in its nature revocable, irrespective of the license being granted by deed or by parol. 4 M.H.C. 98. **A**

Accessory licenses annexed by law.

55. All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called accessory licenses

Illustration.

A sells the trees growing on his land to B. B is entitled to go on the land, and take away the trees.

License when transferable.

56. Unless a different intention is expressed or necessarily implied (1), a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a license cannot be transferred by the licensee (2), or exercised by his servants or agents.

Illustrations.

(*a*) A grants B a right to walk over A's field whenever he pleases. The right is not annexed to any immoveable property of B. The right cannot be transferred.

(*b*) The Government grant B a license to erect and use temporary grain-sheds on Government land. In the absence of express provision to the contrary, B's servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein, and remove grain therefrom.

(Notes).

1.—" Unless a different intention....is necessarily implied."

(1) **License to trap elephants implies a right to employ servants.**

A license to trap elephants on plaintiff's land and carry them away may give the licensee the right to employ his servants to dig pits and aid in capturing the elephant. 16 M. 280=3 M.L.J. 27 (30). **B**

2.—" a license cannot be transferred by the licensee."

(1) **License to trap elephants not transferable.**

But this right to trap elephants and carry them away does not carry with it the right to transfer the license or any part of the rights contained therein. (*Ibid*). **C**

Grantor's duty to disclose defects.

57. The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.

Grantor's duty not to render property unsafe.

58. The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.

Grantor's transferee not bound by license.

59. When the grantor of the license transfers the property affected thereby, the transferee is not, as such, bound by the license.

License when revocable.

60. A license may be revoked by the grantor, unless—

(*a*) it is coupled with a transfer of property, and such transfer is in force [1] :

(*b*) the licensee, acting upon the license, has executed [2] a work of a permanent character, and incurred expenses in the execution.

(Notes).

1.—"it is coupled with a transfer of property."

(1) License not coupled with grant—revocable.

A license to go upon another's land, unless coupled with a grant, is revocable at the will of the grantor, subject to the right of the other to damages, if the license were revoked contrary to the terms of any express or implied contract. 16 C. 640. **D**

(2) License to occupy cattle yard—revocable.

Where a tenant, who was an occupancy tenant in a certain village, and also cultivated certain land in another village, was allowed by the zemindar, who owned both the lands, to occupy a cattle yard and shed in the latter village, the tenant was a mere licensee and the license could be revoked. A.W.N. (1901), 42. **E**

(3) Permission to use a piece of land as cremation ground—License.

Where the plaintiffs, who received permission from the local authorities, used the land in dispute for the purpose of cremation since 1866, the plaintiffs were held to be mere licensees. 8 Bom. L.R. 310. **F**

(4) License coupled with an interest, effect of.

A mere license is something quite different from a license coupled with the creation of an interest. When that exists in a valid form, it operates as a contract or a gift or a grant, and is subject to the same incidents, and is also binding and irrevocable as any other contract, gift, or grant. 4 M.H.C. 98 (99). **G**

(5) Municipal Commissioner's power to grant licenses for milch cattle stables—City of Bombay Municipal Act (III of 1888).

The Municipal Commissioner of the city of Bombay, having a discretionary power to grant a license for the stabling of milch cows, it follows that they have also the power to refuse a license in the exercise of that discretion. The only limit to its exercise is that it should not be arbitrary, vague, and fanciful; but it must be legal and regular. 5 Bom. L.R. 1001. **H**

(6) License for an eating house—Discretion of Commissioner of Police.

The Commissioner of Police has no discretion to refuse a license for an eating house under Act XLVIII of 1860. 26 B. 396=4 Bom. L.R. 1 on appeal from 3 Bom. L.R. 653. **I**

(7) Cantonment Code—License to dairyman.

S. 167, cl (e) of the Cantonment Code (C.P.) prescribes that no dairyman shall carry on his trade unless he has applied for, and obtained, a license from the cantonment authority, and the license cannot be refused if the applicant is willing to comply with such conditions as the cantonment authority may think fit to impose under S. 168. Therefore, an order arbitrarily refusing the license is altogether illegal. 14 C.P.L.R. 135. **J**

1.—"it is coupled with a transfer of property."—(Concluded).

(8) **License for boats plying for hire—Collector's power to revoke—Act X of 1889.**

The Collector has no authority, under the provisions of Act X of 1889 (Indian Ports), to revoke the license, granted to boats plying for hire, on the ground that their continuance would affect the interest of contractors with Government. 4 Bom. L.R. 773. **K**

2.—"the licensee....has executed a work of a permanent character."

(1) **Where licensee has erected a permanent house, license cannot be revoked.**

Where a license was granted by a zemindar to the predecessors in title of the defendant, and they, acting upon the license, built a house, which was of a permanent character, the zemindar could not revoke the license and seek possession of the site. 3 A.L.J. 760=A.W.N. (1906), 305=29 A. 133 (137). **L**

(2) **Katcha thatched house is a work of permanent character.**

A *katcha* thatched house may be a "work of permanent character," although the thatch of the house is removed from time to time. A.W.N. (1906), 216=3 A.L.J. 765=28 A. 741. **M**

(3) **License to erect dam—Expenses incurred by tenant—Revocability.**

Where a license is granted to a tenant to construct a dam, so as to obstruct the flow of water to other lands of the lessor, the lessor can revoke such a license on condition of his paying the expenses, which the tenant might have incurred on the strength of such a license.1 M.H.C. 258. **N**

(4) **Erection of wells by license—Extent of revocability.**

The plaintiff, a zemindar, claimed to have his right declared to build a house on some waste land in the mauza, which was resisted by the defendants, tenants in the mauza, on the ground that they had built wells and water courses on their land, and had a right also to use it as a threshing floor and for stocking cow-dung. *Held*, that the defendants not having acquired any right adverse to the plaintiffs as owners by prescription, or otherwise, their right of use could only be as licensees of the plaintiff. The license could be revoked, except in respect of the wells, which were works of a permanent character, and on which the defendants had incurred expenses. 8 A. 69=A.W.N. (1886), 3. **O**

(5) **Rights of transferee of a tenant—Licensee.**

A tenant by attempting to transfer his holding by mortgage, does not lose his rights. The transfer is void as against the landlord and therefore the tenant-right remains. It may therefore be said, that, when a mortgagee of a tenant is in possession, he is in possession as the licensee of the tenant, and the landlord has no right to turn him out. 3 C.P.L.R. 9 (10). **P**

Revocation express or implied.

61. The revocation of a license may be express or implied (1).

Illustrations.

(*a*) A, the owner of a field, grants a license to B to use a path across it. A, with intent to revoke the license, locks a gate across the path. The license is revoked.

(*b*) A, the owner of a field, grants a license to B to stack hay on the field. A lets or sells the field to C. The license is revoked.

(Note).

1.—"express or implied."

(1) **Revocation of permission implied by continued non-user.**

Where a person, having permission to use the water of a tank, did not use the tank since the excavation of the tank four years ago, the permission may be taken to have been revoked. 15 W.R. 308. Q

License when deemed revoked.

62. A license is deemed to be revoked (1)—

(*a*) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license:

(*b*) when the licensee releases it, expressly or impliedly, to the grantor or his representative:

(*c*) where it has been granted for a limited period, or acquired, on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled:

(*d*) where the property affected by the license is destroyed, or by superior force so permanently altered that the licensee can no longer exercise his right:

(*e*) where the licensee becomes entitled to the absolute ownership of the property affected by the license:

(*f*) where the license is granted for a specified purpose, and the purpose is attained or abandoned, or becomes impracticable:

(*g*) where the license is granted to the licensee as holding a particular office, employment, or character, and such office, employment, or character ceases to exist:

(*h*) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee:

(*i*) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

Note).

1.—"license is deemed to be revoked, &c."

(1) **Denial of licensor's title, whether revokes license.**

A licensee in possession does not, like a tenant, forfeit his license and become liable to immediate ejectment, by denying the title of licensor. A.W.N. (1901), 157. R

Licensee's rights on revocation.

63. Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby, and to remove any goods which he has been allowed to place on such property.

Licensee's rights on eviction.

64. Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation (1) from the grantor.

(Note).

1.—"licensee....entitled to recover compensation."

(1) **Right to recover compensation by licensee—License granted without consideration.**

Where the landlord granted a license to a tenant to construct a dam, without consideration, the tenant was held to be entitled to the reimbursement of his expenses in constructing the dam, on revocation of the license. 1 M.H.C. 258.

S

TABLE OF CASES NOTED IN THE EASEMENTS ACT.

INDIAN LAW REPORTS.

Allahabad Series.

Bombay Series.

* At p. 33 this is wrongly printed as 17 B. 797.

Calcutta Series.—(*Continued*). PAGE

* At p. 66 this is wrongly printed as 6 C. 84.

† At p. 70 this is wrongly printed as 14 A. 839.

‡ At pp. 34 and 35 this is wrongly printed as 14 B. 389.

* At p. 59 this is wrongly printed as 29 C. 63.

* At p. 83 this is wrongly printed as 8 P.R. 1867.

* At p. 37 this is wrongly printed as 4 C.P.L.R. 169.

Bombay Law Reporter.

Calcutta Law Journal.

Calcutta Law Reports.

* At p. 38 this is wrongly printed as 3 C.W.N. 405.

Sutherland's Weekly Reporter.—(*Continued*).

Sutherland's Weekly Reporter.—(*Concluded*).

Madras High Court Reports.

*At p. 33 this is wrongly printed as 22 W.R. 252.

* At p. 15 this is wrongly printed as 2 N.W.P. 269.

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Note :—1. The thick figures at the end of each line refer to the pages of the Act and the alphabets in italics preceding the thick figures refer to the cases having corresponding thick letters against them in those pages.

2. S in Brevier Roman denotes the Section.

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